Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JACK M. WEBB, Special Deputy Receiver for Employers National Insurance Company in Receivership,

Petitioner,

v.

B.C. ROGERS POULTRY, INC. and B.C. ROGERS PROCESSORS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does this Court's opinion in *Quackenbush v. Allstate Insurance Company* stand for the proposition that an action seeking damages never warrants abstention, despite significant precedent upholding abstention under *Burford v. Sun Oil Company* in similar actions involving an insurance company that is also the subject of an ongoing state receivership proceeding?

II. Is a claim for *quantum meruit* an equitable action based upon which a district court may exercise its discretion to remand a case to state court pursuant to the *Burford* abstention doctrine?

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Petitioner, Jack M. Webb, Special Deputy Receiver for Employers' National Insurance Company in Receivership, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, which gives rise to this petition, is reported at *Webb v. B.C. Rogers Poultry, Inc., et al.*, 174 F.3d 697 (5th Cir. 1999) and reprinted in the Appendix hereto ("App. A"). The remand order of the United States District Court for the Western District of Texas, Austin Division, dated February 19, 1998 is not published, but is reprinted in the Appendix hereto ("App. B").

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 21, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The McCarran-Ferguson Act provides, in pertinent part, as follows:

> The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011.

The McCarran-Ferguson Act further provides, in pertinent part, as follows:

> **(a) State regulation.** The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> **(b) Federal regulation.** No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act . . . and the Act of October 15, 1914, as amended, known as the Clayton Act . . . and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012 (internal citations omitted).

Article 21.28 of the Texas Insurance Code is reprinted in the Appendix hereto ("App. D").

STATEMENT OF THE CASE

To fully appreciate the significance of the questions presented by this case, it is essential to consider the background of the receivership of Employers' National Insurance Company ("ENIC") and the background of this case in the courts below.

A. Background of the Receivership of ENIC.

On February 11, 1994, the State of Texas declared ENIC to be insolvent and brought a receivership action against ENIC in the 53rd Judicial District Court of Travis County, Texas (the "State Receivership Court"). Pursuant to the Texas Insurance Code, the State of Texas obtained a Permanent Injunction and Order Appointing Permanent Receiver (the "Permanent Injunction"), which is reprinted in the Appendix hereto ("App. C"). The Permanent Injunction found that ENIC was "insolvent and in a hazardous financial condition," and appointed the Commissioner of Insurance of the State of Texas as the Permanent Receiver and Jack M. Webb ("Receiver") as Special Deputy Receiver of ENIC. *See* App. C at 36a, 47a, 51a. The Permanent Injunction also enjoined any person from interfering with the receivership proceedings or the acts of the Receiver, and from taking any action involving the Receiver outside of the State Receivership Court. *See id.* at 44a, 46a-47a. Further, the Permanent Injunction expressly provided that any lawsuits regarding assets of ENIC must be filed in the State Receivership Court. *See id.*

B. Background of the Litigation between the Receiver and B.C. Rogers.

On behalf of the policyholders and creditors of ENIC, the Receiver sued B.C. Rogers Poultry, Inc. and B.C. Rogers Processors, Inc. (collectively referred to as "B.C. Rogers") in the State Receivership Court for unpaid workers compensation insurance premiums asserting alternative causes of action for breach of contract, *quantum meruit*, or suit on sworn account. B.C. Rogers removed the lawsuit to federal court. The Receiver filed a Motion to Abstain and

Remand based, in part, on the fact that, because this action concerns the State of Texas' regulation of an insolvent insurance company in receivership, it should be determined in the State Receivership Court pursuant to the abstention doctrine set forth in *Burford v. Sun Oil Company*.[1]

On February 19, 1999, the United States District Court for the Western District of Texas, Austin Division, granted the Motion to Abstain and Remand and ordered this cause be remanded to the State Receivership Court (the "Remand Order"). The Court specified that its decision to grant the motion was based on the *Burford* abstention doctrine and held that:

> this lawsuit is simply one of many efforts the receiver engages in to obtain the assets of an insolvent insurance company and to protect the policyholders and the citizens of the State of Texas from injury. The State of Texas is the primary authority for regulating the insurance industry in the State of Texas and Jack Webb, as Special Deputy Receiver, has the court-appointed authority to protect the State of Texas from the insolvency of Employers National Insurance Company, which includes the obtaining of any assets of Employers National Insurance Company. Abstention is appropriate in this case, for if this Court were to exercise federal jurisdiction, it could well interfere with the State of Texas' efforts to effect a coherent policy on a matter of public concern, that is, the collection of assets of an insolvent insurer through a state district court

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1. 319 U.S. 315 (1943).

> receivership proceeding wherein the state district court retains continuing jurisdiction over the liquidation proceeding. Failure to abstain could lead to removal of cases to federal court and possible changes of venue, leaving the receiver facing litigation in several forums and under different circumstances. This would be detrimental to the overall scheme of the liquidation proceedings in Texas when an insurance company becomes insolvent.

See App B at 33a.

B.C. Rogers appealed the Remand Order and argued that, under this Court's opinion in *Quackenbush v. Allstate Insurance Company*,[2] an action seeking damages never warrants abstention. The Receiver presented three counter-arguments that: (a) notwithstanding the *Quackenbush* opinion, long-standing and well-grounded precedent supports abstention in cases involving insolvent insurance companies that are, at the same time, involved in ongoing receivership proceedings; (b) the *Quackenbush* opinion does not impose a *per se* bar to abstention of a case involving a claim for damages; and (c) *quantum meruit* is an equitable action based upon which a district court may exercise its discretion to remand a case to state court based on the *Burford* abstention doctrine.

After considering the parties' briefs and argument of counsel, the United States Court of Appeals for the Fifth Circuit decided, on a vote of 2 to 1, to reverse the Remand Order. As evidenced by the split vote and as further described

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2. 517 U.S. 706 (1996).

below, the panel members differed sharply in their opinions and reasoning. The majority and dissenting opinions below were entered on May 21, 1999 and issued as a mandate on June 14, 1999.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE MAJORITY OPINION BELOW CONFLICTS WITH FEDERAL STATUTE AND THE STATE OF TEXAS' COMPREHENSIVE STATUTORY SCHEME TO REGULATE ITS INSURANCE BUSINESS.

The Receiver's petition should be granted because the majority opinion below, that this case properly belongs in federal court, conflicts with federal statute, as well as the State of Texas' coherent and comprehensive statutory scheme for regulating its insurance business, which includes insurance companies that become insolvent.

Insurance companies are not eligible for the protections afforded by the United States Bankruptcy Code. 11 U.S.C. § 109(b)(2). Instead, federal law, namely the McCarran-Ferguson Act,[3] assigns primary responsibility for regulating the insurance industry to each individual state. *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 500 (1993).[4]

3. 15 U.S.C. §§ 1011-1015.

4. *See Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946) (stating that "obviously Congress' purpose [in enacting the McCarran-Ferguson Act] was broadly to give support to the existing

(Cont'd)

Insolvent insurers are, therefore, subject to the comprehensive oversight of state administrative agencies and courts. *Id.*

In accordance with the McCarran-Ferguson Act, the Texas Legislature has established a comprehensive scheme to regulate the insurance business in Texas. This scheme mandates administrative procedures to be followed in the event of an insurance company's insolvency. *See* TEX. INS. CODE art. 21.28 (App. D) (setting forth general procedures for the liquidation, rehabilitation, reorganization or conservation of insurers); *see also* TEX. INS. CODE art. 21.28-A (relating to insurer delinquencies, prevention of insurer delinquencies, and supervision of insurers, proceedings, conservatorships, and liquidations); TEX. INS. CODE art. 21.28-C (relating to the Texas Property and Casualty Insurance Guaranty Fund and its obligations in the event of insolvency).[5] Furthermore, once an insurance company is declared insolvent, mandatory and exclusive

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(Cont'd)

and future state systems for regulating and taxing the business of insurance" and that Congress achieved that purpose by "declaring expressly and affirmatively that continued state regulation and taxation of [the insurance] business is in the public interest . . ."); *see also Western and Southern Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 653 (1981) (declaring that the "unequivocal language of the McCarran-Ferguson Act [that 'the business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business'] suggests no exceptions").

5. *See also* App. A at 25a-27a, 28a and n.20-30, 34 (citing and discussing pertinent statutory provisions regarding regulation of insurance companies and concluding that "[i]t is abundantly clear that Texas indeed has established a coherent policy in this area").

venue for all proceedings involving the receivership is in the District Court of Travis County, Texas. *See* TEX. INS. CODE art. 21.28 §§ 2(i), 3(h) and 4 (App. D at 60a, 66a-67a, 68a-73a).

As recognized and explained by the Fifth Circuit in *Munich American Reinsurance Company v. Crawford*, such consolidation of actions in a state receivership court:

> prevents the unnecessary and wasteful dissipation of the insolvent company's funds that would occur if the receiver had to defend unconnected suits in different forums across the country.... Consolidation also eliminates the risk of conflicting rulings, piecemeal litigation of claims, and unequal treatment of claimants, all of which are of particular interest to insurance companies and policy holders, who are often relying on policies with the same or similar provisions.... Thus, consolidation, enforced through injunctions, conserves the insurance company's assets for ultimate payment to policyholders as well as other creditors.

141 F.3d 585, 593 (5th Cir.), *cert. denied sub nom, American Re-Insurance Co. v. Crawford*, __ U.S. __, 119 S. Ct. 539 (1998) (internal citations omitted). Moreover, in *Clark v. Fitzgibbons*, a post-*Quackenbush* Fifth Circuit court held that allowing a separate federal court action to proceed concurrently with the state insolvency proceeding would usurp the state's control over the liquidation proceeding, and "defy common sense, as well as notions of comity and the national policy embodied in the McCarran-Ferguson Act." 105 F.3d 1049, 1051, 1052 (5th Cir. 1997).[6]

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6. In an attempt to distinguish the *Clark* case because it does not address the issue of whether a request for damages precludes (Cont'd)

The majority opinion below would hold that – despite the McCarran-Ferguson Act, the State of Texas' comprehensive statutory scheme for regulating the insurance business including insolvent insurance companies, the ongoing proceeding involving ENIC in the State Receivership Court, and the Fifth Circuit's post-*Quackenbush* recognition of the state's prevailing interest in overseeing insurance receivership proceedings – this case belongs in federal district court. Such a conclusion directly contradicts and conflicts with common sense, the governing federal and state statutes, and the pervasive policy considerations involved therein.

As Judge Politz correctly concludes:

> Congress delegated the regulation of the business of insurance to the states, and Texas has created a complex and comprehensive scheme to do exactly that. The Texas legislature has concentrated judicial review of insurance proceedings in Travis County, and consequently those courts, like the Department of Insurance and the Commissioner of Insurance, have developed a specialized knowledge regarding these proceedings. . . . Finally, Texas requires the receiver to 'take such steps as may be necessary to conserve the assets . . . for the purpose of liquidating . . . the affairs of the insurer.'

(Cont'd)
remand under *Quackenbush*, (*see* App. A at 9a n.9), the majority opinion below, instead, reinforces Receiver's position that, notwithstanding the type of relief sought in a particular lawsuit, the governing statutes and overriding policy concerns control application of abstention doctrines.

> By holding that the federal district court possessed jurisdiction over this case, the majority potentially sacrifices one of the chief purposes of the Texas regulatory scheme by effectively requiring the 'dissipation of the insolvent company's funds' likely to result from litigation conducted outside Travis County and away from the court with the responsibility for this insurance company salvage operation. Splintering a portion of this on-going [receivership] proceeding and insisting on jurisdiction herein for the federal district court unduly threatens the scheme enacted by Texas as specifically authorized by Congress.

See App. A at 27a-29a.

In sum, by reversing the district court and allowing this case to continue in federal court, the Fifth Circuit has created law that directly conflicts with the McCarran-Ferguson Act, as well as the State of Texas' comprehensive statutory scheme to regulate the insurance business in Texas. The majority opinion below effectively usurps the control granted by federal statute to the State of Texas to control receivership proceedings, guts the comprehensive statutory scheme enacted by the Texas Legislature to regulate its insurance industry, and destroys the Receiver's ability to carry out his court-ordered and statutorily mandated duties. For these reasons, the Receiver's petition should be granted.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE MAJORITY OPINION BELOW CONFLICTS WITH WELL-GROUNDED AND LONG-STANDING PRECEDENT SUPPORTING *BURFORD* ABSTENTION IN SIMILAR CASES.

The Receiver's petition should be granted so that the Court may confirm that the *Quackenbush* opinion does not stand for the proposition that an action seeking damages never warrants abstention, and affirm the importance of significant precedent upholding *Burford* abstention in actions involving an insurance company that is concurrently involved in state receivership proceedings.

A federal court may refuse to exercise jurisdiction over a case and defer the matter to a state court with concurrent jurisdiction. *Burford*, 319 U.S. at 317-18. This abstention principle, known as the *Burford* doctrine, is designed to prevent federal courts from interfering with specialized state regulatory schemes. *See Sierra Club v. City of San Antonio*, 112 F.3d 789, 796 (5th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 879 (1998) (explaining that the "*Burford* abstention doctrine is particularly appropriate where 'by proceeding the district court would have risked reaching a different answer than the [state] institutions with greater interest in and familiarity with such matters' ").

Prior to *Quackenbush*, the Fifth Circuit, as well as other district and circuit courts, consistently approved abstention under the *Burford* doctrine in cases involving insolvent insurers concurrently involved in ongoing receivership

proceedings.[7] The majority opinion below intimates, however, that *Quackenbush* rendered this vast body of precedent worthless based on a bold conclusion that "the Court determined that an action seeking damages never warrants abstention." *See* App. A at 6a.

Contrary to assertions made in the majority opinion below, in *Quackenbush,* this Court specifically refused to follow a rigid *per se* rule for applying the *Burford* doctrine based simply on the category of relief sought. 517 U.S. at 730. Instead, the Court pronounced that:

> Ultimately, what is at stake is a federal court's decision, based on a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the 'independence of state action,' . . . that the State's interests are paramount and that a dispute would best be adjudicated in a state forum.

Id. at 728 (internal citation omitted).

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7. *See Munich Am. Reins. Co.*, 141 F.3d at 589 n.2 (citing collected precedent); *see also Barnhardt Marine Ins., Inc. v. New England Int'l Surety of Am., Inc.*, 961 F.2d 529, 531-32 n.4 (5th Cir. 1992) (noting that, at the time, with only one exception, the Federal Courts of Appeals agreed that federal courts should abstain from becoming involved in insurance company liquidation proceedings and citing collected authority); *see, e.g., Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 703-04 (10th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989); *Gonzalez v. Media Elements, Inc.*, 946 F.2d 157 (1st Cir. 1991); *Hartford Casualty Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419, 426 (7th Cir. 1990); *Lac D'Amiante du Quebec, Ltee v. American Home Assurance Co.*, 864 F.2d 1033, 1045 (3rd Cir. 1988); *Dykhouse v. Corporate Risk Management Corp.*, 961 F.2d 1576, 1992 WL 97952 at *3 (6th Cir. 1992) (per curiam) (unpublished op.—text in Westlaw).

Additional support for this argument is found in the recent opinion in *DeMauro v. DeMauro*, wherein the First Circuit likewise interprets the *Quackenbush* holding to mean "that abstention, under *Burford* or otherwise, may be appropriate in suits for damages." 115 F.3d 94, 98 (1st Cir. 1997). Similarly persuaded that this Court did not intend for its opinion in *Quackenbush* to "torpedo" a district court's ability to abstain when appropriate under the *Burford* doctrine, Judge Politz focused on the traditional balance of state and federal concerns, which forms the basis for the solid background of precedent upholding *Burford* abstention in situations similar to the case at hand. *See* App. A at 24a-29a.

The Receiver's petition should be granted so that the Court may confirm that the *Quackenbush* opinion does not stand for the proposition that an action seeking damages never warrants abstention, and affirm the importance of significant precedent upholding *Burford* abstention in actions involving an insurance company that is concurrently involved in state receivership proceedings.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE MAJORITY OPINION BELOW CONFLICTS WITH A PRIOR DECISION OF THE SECOND CIRCUIT.

The Receiver's petition should be granted because the majority opinion below, that *quantum meruit* is strictly an action at law and, therefore, will not support abstention, conflicts with a prior decision from the Second Circuit.

Although the majority opinion below string cites various state court opinions purportedly supporting the proposition that a claim for *quantum meruit* is strictly an action at law, it wholly fails to address how any federal circuit court has previously answered the question – is a claim for *quantum meruit* an equitable action or, rather, an action at law? The Second Circuit recently answered that question by expressly providing that "*quantum meruit* is an equitable remedy." *McNamee, Lochner, Titus & Williams, P.C. v. Higher Educ. Assistance Found.*, 50 F.3d 120, 125 n.1 (2nd Cir. 1995).

The Receiver's petition should be granted so that this Court may resolve the conflict created by the majority opinion below and prior case law emanating from the Second Circuit.

IV.

THE PETITION SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT'S OPINION CONFLICTS WITH PRIOR DECISIONS OF THE TEXAS SUPREME COURT.

The Receiver's petition should be granted because the majority opinion below, that *quantum meruit* is strictly an action at law and, therefore, will not support abstention, conflicts with prior decisions of the Texas Supreme Court.

As the majority opinion below correctly recognizes, "Texas courts have noted the equitable nature of *quantum meruit*." *See* App. A at 12a and n.13 (citing collected authority from Texas and other states). In particular, the Texas Supreme Court has, on at least two occasions, expressly provided that a claim for *quantum meruit* arises in

equity. *See Vortt Exploration Co. v. Chevron U.S.A.*, 787 S.W.2d 942, 944 (Tex. 1990) ("*Quantum meruit* is an equitable remedy"); *Truly v. Austin*, 744 S.W.2d 934, 938 (Tex. 1988) ("Recovery in *quantum meruit* is based on equity").

The Receiver's petition should be granted so that this Court may resolve the conflict created by the majority opinion below and prior opinions by the State of Texas' highest court.

V.

THE PETITION SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL ISSUE THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Receiver's petition should be granted because the Fifth Circuit, by way of the majority opinion below, has decided an important federal issue – whether a claim for *quantum meruit* is an equitable action supporting abstention by a federal court – that has not been, but should be, settled by this Court.

Neither the *Quackenbush* opinion nor any subsequent opinions issued by this Court address whether a claim for *quantum meruit* is an equitable action that will support abstention under the *Burford* doctrine in the context of a concurrent state receivership proceeding. If left unsettled, the majority opinion below will provide the only applicable case law and, effectively, turn the State of Texas' regulatory scheme and its governance of insolvent insurance companies on its ear. The Receiver's petition should be granted to address such an important federal issue in this case of first impression.

CONCLUSION

This case first presents a question of exceptional importance to the state judiciary, as well as the federal bench – does this Court's opinion in *Quackenbush v. Allstate Insurance Company* stand for the proposition that an action seeking damages never warrants abstention, despite significant precedent upholding *Burford* abstention in similar actions involving an insurance company that is also the subject of an ongoing state receivership proceeding? The only sensible answer to this question is "no."

If the majority opinion below is allowed to stand, the State of Texas' comprehensive statutory scheme for regulating its insurance business and, in particular, insolvent insurance companies will be severely and adversely affected. The regulatory regime adopted and enforced by the State of Texas provides for the orderly and fair resolution of claims by or against an insolvent insurer. Parallel federal and state proceedings would only serve to disrupt Texas' legislative framework for the liquidation of insolvent insurers, like ENIC. Moreover, granting the Receiver's petition will give this Court a much-needed opportunity to clarify its opinion in *Quackenbush*, which, as evidenced by the vastly contrasting opinions of the Fifth Circuit panels members, has caused a great deal of confusion in the three years since it was issued. Upon granting the Receiver's petition, this Court may confirm that the *Quackenbush* opinion does not stand for the proposition that an action seeking damages never warrants abstention, and affirm the importance of significant precedent upholding *Burford* abstention in actions involving an insurance company that is concurrently involved in state receivership proceedings.

This case also presents an equally important second question for resolution – is a claim for *quantum meruit* an equitable action based upon which a district court may exercise its discretion to remand a case to state court pursuant to the *Burford* abstention doctrine? Because this question remains unanswered by this Court and has produced different answers in the various lower courts, the Receiver's petition should be granted so that this Court may resolve the conflict between the majority opinion below and prior opinions issued by the Second Circuit court and the Texas Supreme Court.

Accordingly, the Receiver respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED MAY 21, 1999

Jack M. WEBB, Special Deputy Receiver for Employers National Insurance Company in Receivership, Plaintiff-Appellee,

v.

B.C. ROGERS POULTRY, INC., and B.C. Rogers Processors, Inc., Defendants-Appellants.

No. 98-50527.

United States Court of Appeals,
Fifth Circuit.

May 21, 1999.

* * *

Before REAVLEY, POLITZ and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

B.C. Rogers Poultry, Inc., and B.C. Rogers Processors, Inc. (collectively, "B.C. Rogers"), appeal a remand to state court ordered pursuant to the *Burford* abstention doctrine. Concluding that the court acted without the doctrine's strictures as defined by the Supreme Court, we reverse.

Appendix A

I.

The State of Texas brought Employers National Insurance Company ("ENIC"), an insurance company regulated under Texas law, into state court, where it was declared insolvent and placed in receivership. Pursuant to the Texas Insurance Code, the state obtained a permanent injunction and order, appointing Jack Webb as Special Deputy Receiver ("SDR") for ENIC and enjoining any person from interfering with the state receivership court proceedings or the lawful acts of the SDR and from taking any action involving the SDR outside of the state receivership court.

Webb, carrying out his duties as SDR, brought suit in state court against B.C. Rogers, as ENIC policyholders, to collect assets — unpaid workers' compensation premiums — allegedly belonging to ENIC. Webb asserts three alternative causes of action: (1) breach of contract, (2) *quantum meruit,* and (3) suit on sworn account. He seeks $674,335 in damages, plus interest and attorney's fees.

B.C. Rogers removed to federal court pursuant to 28 U.S.C. § 1441, alleging original jurisdiction based on diversity of citizenship. *See* 28 U.S.C. § 1332. Webb sought remand, advancing three grounds: (1) B.C. Rogers had failed to comply with the removal statute, (2) the permanent injunction enjoined B.C. Rogers from litigating the dispute in a forum other than the receivership court, and (3) under the *Burford* abstention doctrine, the district court should refrain from exercising jurisdiction.[1] The district court

1. *See Burford v. Sun Oil Co.,* 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

summarily rejected the first two bases but elected *Burford* abstention and remanded, holding that

> [a]bstention is appropriate in this case, for if this Court were to exercise federal jurisdiction, it could well interfere with the State of Texas' efforts to effect a coherent policy on a matter of public concern, that is, the collection of assets of an insolvent insurer through a state district court receivership proceeding wherein the state district court retains continuing jurisdiction over the liquidation proceedings.

II.

We always must be certain that our limited jurisdiction encompasses the appeal before us. *See Castaneda v. Falcon,* 166 F.3d 799, 801 (5th Cir.1999); *Jones v. Collins,* 132 F.3d 1048, 1051 (5th Cir.1998). We *sua sponte* requested briefing on the issue and now clarify our jurisdiction.

The order abstaining under *Burford* and remanding is a final order disposing of all issues. We have jurisdiction, therefore, pursuant to 28 U.S.C. § 1291. *See Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 715, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996); *Munich Am. Reinsurance Co. v. Crawford,* 141 F.3d 585, 589 (5th Cir.1998), *cert. denied,* __ U.S. __, 119 S.Ct. 539, 142 L.Ed.2d 448 (1998).

In 28 U.S.C. § 1334(d), Congress has denied us jurisdiction over an appeal from a decision to abstain under § 1334(c) (allowing abstention, in the interest of comity or

respect for state law, from state law causes of action arising under, or related to, title 11). Here, the receivership proceedings in state court arose under the Texas Insurance Code, not the Bankruptcy Code. *See Clark v. Fitzgibbons,* 105 F.3d 1049, 1051 (5th Cir.1997) ("Insurance companies are ineligible for the protections afforded by the federal Bankruptcy Code. 11 U.S.C. § 109."). The district court, therefore, did not exercise jurisdiction over the removed action under 28 U.S.C. § 1452(a) (providing for removal of any action over which the court has jurisdiction under 28 U.S.C. § 1334) and 28 U.S.C. § 1334(b) (providing for original jurisdiction in the district courts "of all civil proceedings arising under title 11, or arising in or related to cases under title 11."). Rather, it based its jurisdiction on diversity of citizenship, found in 28 U.S.C. § 1332. The court's decision to abstain, then, did not fall within 28 U.S.C. § 1334(c), so § 1334(d) is inapposite.

Similarly, in 28 U.S.C. § 1447(d), Congress denied us jurisdiction over remands pursuant to 28 U.S.C. § 1447(c), which requires a district court to remand if it lacks subject matter jurisdiction or if the removal was defective; conversely, § 1447(d) does not preclude review of remands on other grounds.[2] Neither party argues that the district court

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2. *See Things Remembered, Inc. v. Petrarca,* 516 U.S. 124, 127, 116 S.Ct. 494, 133 L.Ed.2d 461 (1995); *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 345-52, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976); *see also, e.g., Angelides v. Baylor College of Med.,* 117 F.3d 833, 835-36 (5th Cir.1997); *Soley v. First Nat'l Bank of Commerce,* 923 F.2d 406, 407-08 (5th Cir.1991). Our inability to review a § 1447(c) remand obtains even if the order was erroneous. *See Thermtron,* 423 U.S. at 351, 96 S.Ct. 584; *Angelides,* 117 F.3d at 836.

lacked subject matter jurisdiction. Rather, they dispute whether the court abused its discretion in abstaining from exercising its jurisdiction. Section 1447(d), therefore, is also inapposite, and we have jurisdiction to consider the appeal.

III.

The *Burford* doctrine allows a federal court to abstain from exercising its jurisdiction in deference to complex state administrative procedures. The Supreme Court has described the *Burford* doctrine as follows:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Pub. Serv., Inc. v. Council of New Orleans ("*NOPSI*"), 491 U.S. 350, 361, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)).[3] Essentially, *Burford* instructs a district

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3. *See also Baran v. Port of Beaumont Navigation Dist.*, 57 F.3d 436, 441 (5th Cir.1995).

court to weigh the federal interests in retaining jurisdiction over the dispute against the state's interests in independent action to uniformly address a matter of state concern, and to abstain when the balance tips in favor of the latter. *See Quackenbush,* 517 U.S. at 728, 116 S.Ct. 1712; *NOPSI,* 491 U.S. at 363, 109 S.Ct. 2506; *Burford,* 319 U.S. at 334, 63 S.Ct. 1098. But this "balance only rarely favors abstention." *Quackenbush,* 517 U.S. at 728, 116 S.Ct. 1712. Typically, "federal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River,* 424 U.S. at 821, 96 S.Ct. 1236 (quotation omitted).

In *Quackenbush,* the Court determined that an action seeking damages never warrants abstention. The Court examined the foundation and history of abstention doctrines, and *Burford* abstention in particular, finding that the power to abstain originated in "the discretion federal courts have traditionally exercised in deciding whether to provide equitable or discretionary relief." *Quackenbush,* 517 U.S. at 730, 116 S.Ct. 1712. The Court disagreed with the Ninth Circuit's limitation of abstention to equitable cases, instead extending the doctrine "to all cases in which a federal court is asked to provide some form of discretionary relief." *Id.*[4] A damages action, however, allows the court no discretion and may not be remanded. *Id.* at 731, 116 S.Ct. 1712.[5]

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4. *See also Quackenbush,* 517 U.S. at 718, 116 S.Ct. 1712 (recognizing that "the authority of a court to abstain from exercising its jurisdiction extends to all cases in which the court has discretion to grant or deny relief.").

5. *See id.* at 731, 116 S.Ct. 1712 ("[F]ederal courts have the power to dismiss or remand cases based on abstention principles

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Appendix A

A.

We review an abstention for abuse of discretion. *See Clark,* 105 F.3d at 1051; *see also Burford,* 319 U.S. at 318, 63 S.Ct. 1098 (describing court's choice of whether to abstain as a matter of discretion). The exercise of discretion must "fit[ ] within the narrow and specific limits prescribed by the particular abstention doctrine involved." *Clark,* 105 F.3d at 1051 (quotation omitted). A court necessarily abuses its discretion when it abstains outside of the doctrine's strictures.

B.

B.C. Rogers presents a simple argument for reversal: Under *Quackenbush,* a court may not remand pursuant to *Burford* abstention if the plaintiff seeks damages. Webb seeks damages, so a *Burford* abstention remand is not permitted.

Webb counters with three ultimately unsuccessful arguments. First, he cites precedent no longer applicable after *Quackenbush* and argues to support an exercise of discretion where no discretion exists. He next incorrectly avers that the *Quackenbush* rule on which B.C. Rogers relies is not ironclad. He finally contends that, because one of his causes

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only where the relief being sought is equitable or otherwise discretionary. Because this was a damages action, we conclude that the District Court's remand was an unwarranted application of the *Burford* doctrine."). Although remanding a damages case is inappropriate, the Court noted that a court could stay an action pending resolution in state court of an issue relevant to the federal case if the *Burford* doctrine called for abstention. *Id.*

of action sounds in the equitable doctrine of *quantum meruit*, *Burford* abstention is appropriate within *Quackenbush*'s limitations.[6] We conclude that, because *Quackenbush* denies the legal authority to remand, the district court abused its discretion.

1.

Webb vigorously argues that the usual *Burford* considerations support remand. The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, assigns primary responsibility for regulating the insurance industry to the states. Texas has enacted an extensive regulatory scheme for dealing with insolvent insurers and has an interest in applying its law to marshal efficiently all the assets of such insurers in a uniform manner. Webb contends that the federal government, on the other hand, has a "complete absence" of interest in this dispute. The causes of action sound solely in state law; no federal statutes or interests are involved.

Webb buttresses this argument by citing several of our decisions in which we have affirmed abstention and have mentioned the strong interests states have in addressing insolvent insurers.[7] But these cases indicate only that we

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6. This argument relies on two premises: (1) A *quantum meruit* claim falls within the set of cases from which the Supreme Court has found a district court may abstain, and (2) a court may abstain and remand an entire case, including damages actions, so long as one cause of action falls within that set *Quackenbush* approved. Because we reject the first premise, we do not reach the second.

7. *See, e.g., Barnhardt Marine Ins., Inc. v. New England Int'l Sur. of Am., Inc.*, 961 F.2d 529, 531-32 n. 4 (5th Cir.1992) (affirming

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probably would find the remand to be within the court's discretion if it had acted within the bounds of the *Burford* doctrine.[8] The analysis ignores B.C. Rogers's argument that the district court had no discretion.

Relatedly, Webb overlooks that these cited cases precede *Quackenbush* and the limits it imposed on abstention.[9] As

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remand and noting near unanimity among the circuit courts that *Burford* abstention is appropriate in cases related to a state's administration of an insolvent insurer); *Martin Ins. Agency, Inc. v. Prudential Reinsurance Co.*, 910 F.2d 249 (5th Cir.1990).

8. This is true even though Webb overstates his case in declaring the "complete absence" of federal interest. The district court assumed removal jurisdiction based on diversity pursuant to 28 U.S.C. § 1332. The Constitution, in Art. III, § 2, allows for federal court jurisdiction in cases and controversies "between Citizens of different States." When Congress first created lower federal courts in the Judiciary Act of 1789, Act of Sept. 24, 1789, 1 Stat. 73, it included diversity jurisdiction as one basis for original federal court jurisdiction — a basis that has survived since. The presupposition for diversity jurisdiction is to provide diverse parties with a federal forum in which an out-of-state party might escape local bias. *See, e.g., Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 546 n. 6, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995) (noting this purpose). By this grant of jurisdiction, Congress has expressed a federal interest in administering impartial justice to diverse parties.

9. Webb cites one case, *Clark*, in which we affirmed an abstention remand in an insurance case post-*Quackenbush*. *See Clark*, 105 F.3d at 1052. *Clark* does not control our outcome, because we did not confront the issue we face here. We did not discuss whether the damages sought precluded remand under *Quackenbush* and, indeed, we did not cite *Quackenbush*.

we explained in *Munich American*, we previously had approved abstention remands in cases related to insolvent insurers involved in state proceedings; but this changed with *Quackenbush*'s prohibition on remanding damages action. *See Munich American*, 141 F.3d at 589. Now a court may abstain "only when the district court has discretion to grant or deny relief." Id. Accordingly, we found that the court abused its discretion by invoking *Burford*, because it had no discretion in the relief sought. *Id.* at 590.[10]

Webb's argument and the cited precedent would provide a sound basis for affirming the district court's application of the *Burford* doctrine if it were within its discretion. Because, however, we find that the nature of Webb's claims precludes *Burford* abstention, we do not reach whether the *Burford* doctrine otherwise favors abstention on these facts.

2.

Webb's contention that *Quackenbush* does not impose an ironclad, per se bar to remanding damages action lacks merit. Webb quotes a passage[11] from a section in which the

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10. Webb attempts to distinguish *Munich American* by comparing the alleged lack of federal interest here to the federal interest in the Federal Arbitration Act ("FAA") on which the *Munich American* plaintiffs relied. But our discussion of the FAA focused on the lack of discretion in the relief sought, which bars a remand; we did not reference, even in passing, a federal interest.

11. "Ultimately, what is at stake is a federal court's decision, based on a careful consideration of the federal interests in retaining

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Court explained the roots and purpose of abstention. *See Quackenbush*, 517 U.S. at 727-28, 116 S.Ct. 1712. It also noted that prior caselaw does "not provide a formulaic test for determining when dismissal [or remand] under *Burford* is appropriate." Id. at 727, 116 S.Ct. 1712. But the Court had not even begun its application of these general principles to the case before it. When it did reach its holding, it left no exceptions: abstention is appropriate "*only* where the relief being sought is equitable or otherwise discretionary." *Id.* at 731, 116 S.Ct. 1712 (emphasis added).[12]

3.

Webb makes the superficially appealing argument that the "equitable nature" of *quantum meruit* brings the case

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jurisdiction over the dispute and the competing concern for the 'independence of state action,' that the State's interests are paramount and that a dispute would best be adjudicated in a state forum." *Quackenbush*, 517 U.S. at 728, 116 S.Ct. 1712 (internal citation omitted).

12. *See also id.* at 730, 116 S.Ct. 1712 (noting that staying a damages action is permissible, "but we have not permitted [courts] to dismiss the action altogether"). Webb also resourcefully quotes a decision interpreting *Quackenbush* to mean "that abstention, under *Burford* or otherwise, may be appropriate in suits for damages." *See DeMauro v. DeMauro*, 115 F.3d 94, 98 (1st Cir.1997). Although true, this lends no support to Webb's position. The court further explained that a "district court may only order a stay pending resolution of state proceedings; it cannot invoke abstention to dismiss the suit altogether." *Id.* Here, the court did not stay the action; it remanded, the functional equivalent of dismissal in this context.

within *Quackenbush* and allows for remand. "*Quantum meruit* is an equitable doctrine based on the principle that one who benefits from another's labor and materials should not be unjustly enriched thereby." *SMP Sales Management, Inc. v. Fleet Credit Corp.*, 960 F.2d 557, 560 n. 3 (5th Cir.1992). Texas courts also have noted the equitable nature of *quantum meruit*.[13] Because the case includes this claim for equitable relief, the argument goes, it falls within *Quackenbush* and may be remanded.

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13. *See, e.g., Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex.1992) ("Quantum meruit is an equitable theory of recovery which is based on an implied agreement to pay for benefits received."); *Vortt Exploration Co. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex.1990) ("Quantum meruit is an equitable remedy which does not arise out of a contract, but is independent of it."); *see also, e.g., Brankline v. Capuano*, 656 So.2d 1, 5 (La.App. 3d Cir.1995) ("Quantum meruit is an equitable remedy founded upon the principle that no one who benefits from the labor or materials of another should be unjustly enriched at the other's expense."); *McGee v. McGee*, 277 N.J.Super. 1, 648 A.2d 1128, 1133 (1994) (describing "equitable remedies such as . . . quantum meruit," "invocable for equitable reasons"); *Feingold v. Pucello*, 439 Pa.Super. 509, 654 A.2d 1093, 1094 (1995) ("Quantum meruit is an equitable remedy."); *Castelli v. Lien*, 910 S.W.2d 420, 428 (Tenn.Ct.App.1995) ("quantum meruit is an equitable remedy" available if the contract is no longer enforceable); *Po River Water & Sewer Co. v. Indian Acres Club, Inc.*, 255 Va. 108, 495 S.E.2d 478, 482 (1998) (describing relief under quantum meruit theory as equitable); *Bowles v. Sunrise Home Ctr., Inc.*, 847 P.2d 1002, 1004 (Wyo.1993) ("Unjust enrichment (or quantum meruit) is an equitable remedy which implies a contract").

Webb reads *Quackenbush* too simply and fails to comprehend the complexity of *quantum meruit*. For *Burford* to apply, a federal court must be sitting in equity with the discretion to deny relief. *See Quackenbush*, 517 U.S. at 728, 116 S.Ct. 1712 (explaining that the power to abstain "derives from the discretion historically exercised by courts of equity."). As part of the Court's formulation of when abstention doctrines apply, the court must be sitting in equity.[14]

In *Quackenbush*, the Court emphasized a court of equity's discretion to grant or deny relief, holding that abstention based remands or dismissals are appropriate "only where the relief being sought is equitable or otherwise

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14. *See Quackenbush*, 517 U.S. at 728, 116 S.Ct. 1712; *id.* at 717, 116 S.Ct. 1712 ("[I]t has long been established that a federal court has the authority to decline to exercise jurisdiction when it 'is asked to employ its historic powers as a court of equity.' ") (quoting *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 120, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981) (Brennan, J., concurring)); *NOPSI*, 491 U.S. at 361, 109 S.Ct. 2506 (explaining that in certain circumstances "a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies"); *see also Tribune Co. v. Abiola*, 66 F.3d 12, 16 (2d Cir.1995) ("We find it significant that the Supreme Court [in *NOPSI*] traced the origin of abstention doctrines to the federal court's discretion to withhold equitable relief, and reformulated the *Burford* doctrine to require federal courts 'sitting in equity' to abstain from exercising their jurisdiction in certain circumstances." (citation omitted)); *id.* at 15-16 ("When a federal court sits in equity[,]" abstention may be warranted).

discretionary." *Quackenbush,* 517 U.S. at 731, 116 S.Ct. 1712.[15] The source of the power to abstain confirms the centrality of the court's sitting in equity and hence possessing discretion in the relief afforded. *See Quackenbush,* 517 U.S. at 728, 116 S.Ct. 1712. That discretion allows it to deny relief; the abstention doctrines merely add that "the exercise of this discretion must reflect principles of federalism and comity." *Id.* When a court considers these factors, balancing state and federal interests, discretion may favor withholding relief by way of abstention-based remand or dismissal.[16]

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15. The use of "or otherwise" rather than simply "or discretionary" in "equitable or otherwise discretionary" implies that the Court assumed that the equitable relief to which it referred also was discretionary. *See also Quackenbush,* 517 U.S. at 730, 116 S.Ct. 1712 (holding abstention extends "to all cases in which a federal court is asked to provide some form of discretionary relief"); *Munich Am.,* 141 F.3d at 589 ("*Burford* abstention is permissible only when the district court has discretion to grant or deny relief.").

16. The higher degree of interference with state proceedings that injunctive or declaratory relief imposes, as opposed to a damages award, also favors allowing abstention when a court sits in equity, but not in an action at law. *See Quackenbush,* 517 U.S. at 717-18, 116 S.Ct. 1712 ("The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. . . . Few public interest have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies [by means of abstention]. . . ."); *Tribune Co.,* 66 F.3d at 16 (holding that abstention is available only when the court sits in equity, because "[i]njunctions are the most intrusive sort of judicial relief, and may directly interfere with the proceedings or orders of state administrative agencies." (quotation omitted)).

> This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts. . . . On the contrary, it is but a recognition . . . that a federal court of equity . . . should stay its hand in the public interest when it reasonably appears that private interests will not suffer. . . . It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.

Alabama Pub. Serv. Comm'n v. Southern R.R., 341 U.S. 341, 350-51, 71 S.Ct. 762, 95 L.Ed. 1002 (1951).

b.

When a court hears a claim for *quantum meruit*, it neither sits in equity nor possesses discretion. Courts frequently refer to *quantum meruit* as an equitable doctrine and even as seeking equitable relief. Despite its equitable nature, however, *quantum meruit* is an action at law — a legal cause of action seeking money damages. Indeed, courts recognize that they do not sit in equity when they hear a *quantum meruit* claim,[17] and

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17. *See American Nat'l Ins. Co. v. Warnock*, 131 Tex. 457, 114 S.W.2d 1161, 1165 (1938) (holding that, although "courts of equity will not enforce" the statute of frauds if doing so would work a fraud, specific performance will not be granted for land contract barred by statute of frauds, "since the value of the consideration may be recovered in an action at law on a quantum meruit."); *Upson*

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they recognize that a division between equity and law places *quantum meruit* on the law side.[18]

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v. Fitzgerald, 129 Tex. 211, 103 S.W.2d 147, 150 (1937) (same); *Richardson v. Iley*, 299 S.W.2d 187, 188 (Tex.Civ.App. — San Antonio 1957, writ ref'd n.r.e.) (same); *see also, e.g., Tompkins v. Hoge*, 114 Cal.App.2d 257, 250 P.2d 174, 178 (1952) (denying equitable relief of specific performance because, the services being compensable "in quantum meruit, the remedy at law is adequate"); *Frontier Properties Corp. v. Swanberg*, 488 N.W.2d 146, 147 (Iowa 1992) ("[A]ctions for amounts due under a contract or for quantum meruit recovery based on implied contract are actions at law."); *Campbell v. Welsh*, 54 Md.App. 614, 460 A.2d 76, 82 (1983) (referencing cases that permit "recovery at law, on a quantum meruit basis"); *Van Horn v. DeMarest*, 76 N.J. Eq. 386, 77 A. 354, 367-68 (1910) (referring to "an action at law upon a quantum meruit"); *Ogletree, Deakins, Nash, Smoak & Stewart P.C. v. Albany Steel Inc.*, 243 A.D.2d 877, 663 N.Y.S.2d 313, 315 (1997) (rejecting categorization of claim as equitable because a "quantum meruit action is essentially an action at law, inasmuch as it seeks money damages in the nature of a breach of contract, notwithstanding that the rationale underlying such causes of action is fairness and equitable principles in a general rather than legal sense.") (quotation omitted); *Cordrey v. Cordrey*, 579 P.2d 209, 213 (Okla.App. Div. 2 1978) (describing quantum meruit action as "one at law and not equity"); *Welch v. Webb*, 47 Or.App. 771, 615 P.2d 391, 393 n. 3 (1980) ("This case, brought as a suit in equity, has become an action at law for quantum meruit."); *Tri State Home Improvement Co. v. Mansavage*, 77 Wis.2d 648, 253 N.W.2d 474, 479 (1977) ("A cause of action for quantum meruit, while equitable in nature, is an action at law" usually heard by jury, and not by court sitting in equity).

18. *See, e.g., Allen v. Peachtree Airport Park Joint Venture*, 231 Ga.App. 549, 499 S.E.2d 690, 691 (1998) (rejecting argument

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Furthermore, in a *quantum meruit* action, the court lacks discretion to balance interests between the state and federal governments. Relief turns not on a weighing of the equities but on a straightforward application of law to facts. If the facts justify relief under the legal standard — a question often answered by jury — the court has no discretion to weigh the equities and decide against relief.[19]

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that district court lacked jurisdiction "to determine equitable issues such as quantum meruit" because "state courts have subject matter jurisdiction of quantum meruit claims, which are considered actions at law"); *Ordon v. Johnson,* 346 Mich. 38, 77 N.W.2d 377, 383 (1956) (affirming transfer of cause by chancery judge to law side to allow hearing on quantum meruit claim); *Craig v. Jo B. Gardner, Inc.,* 586 S.W.2d 316, 325 (Mo.1979) (holding court of equity could hear *quantum meruit* claim, "a suit at law," but only because equity court already had "rightful possession" of case because of equitable claim); *Galloway v. Eichells,* 1 N.J.Super. 584, 62 A.2d 499, 502 (1948) (transferring action to Law Division because only possible relief would be damages "at law upon quantum meruit"); *Turcott v. Gilbane Bldg. Co.,* 94 R.I. 225, 179 A.2d 491, 493 (1962) (holding that *quantum meruit* action, "a remedy at law," must be brought "in an action at law" and not in a court of equity); *Lanmor Corp. v. B M & K Builders, Inc.,* 1990 WL 751279, *3, 1990 Va. Cir. LEXIS 443, at *7 (Va.Cir.Ct. Sept. 10, 1990) (denying leave to amend bill of equity to add *quantum meruit,* which "involves legal principles cognizable at law, not in equity," because sustaining demurrer on equitable claims left no basis for equitable jurisdiction).

19. *Cf. Knebel v. Capital Nat'l Bank,* 505 S.W.2d 628, 631 (Tex.Civ.App. — Austin 1974) (describing the "equitable concept" of unjust enrichment, "enforced through the common law courts as Quantum meruit," which "*obligated* the common law courts" to enforce certain implied promises) (emphasis added), *aff'd in part and rev'd in part on other grounds,* 518 S.W.2d 795 (Tex.1974).

Sitting at law, without discretion to deny relief, a court cannot remand a *quantum meruit* claim under *Quackenbush*. The state's interests must yield to the federal court's "strict duty to exercise the jurisdiction that is conferred upon [it] by Congress." *Quackenbush*, 517 U.S. at 716, 116 S.Ct. 1712. Because the district court lacked discretion to remand these damages actions, we REVERSE and REMAND for further proceedings consistent with this opinion.

Appendix A

POLITZ, Circuit Judge, dissenting:

My colleagues in the majority have issued a forceful opinion from which I respectfully must dissent.

My colleagues conclude that the district court abused its discretion by abstaining under *Burford*[1] because the nature of Webb's claims precludes abstention. According to the *Burford* abstention doctrine, a federal court may abstain and remand a case to state court "only where the relief being sought is equitable or otherwise discretionary."[2] After determining that Webb's claim for *quantum meruit* is an action at law — a determination that in part spurs my dissent — the majority concludes that the district court was not sitting in equity and did not possess discretion to grant or deny relief. Thus, they opine, the district court acted outside the strictures of the doctrine by abstaining. I dissent, concluding that *quantum meruit* more appropriately should be considered an equitable action, and fully convinced that the district court's abstention order should be affirmed.

I.

The nature of *quantum meruit* is, indeed, "complex[ ]."[3] The majority describes *quantum meruit* as an action at law

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1. *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

2. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 731, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996).

3. *Supra*, at 703. *Cf.* 5 ALAN LINTON CORBIN, CORBIN ON CONTRACTS § 1103, at 557 (1964) ("The remedy of restitution

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— a legal cause of action seeking money damages — and cites numerous cases in support thereof. There is contrary jurisprudence describing *quantum meruit* as an equitable action.[4] "The battle of the string citations [, however,] can have no winner."[5] Thus, reflection on the Supreme Court's discussion in *Quackenbush v. Allstate Insurance Company*[6] is appropriate.

Congress imposed upon the federal courts a duty to exercise their jurisdiction, but the statutes conferring

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[, a broad remedy within which *quantum meruit* has been classified,] cannot properly be described as either 'legal' or 'equitable' in any narrowly restricted signification of those terms. It was once a remedy that was created and applied by both the Judges and the Chancellors. . . .").

4. *See supra,* at 707 n. 13; *FDIC v. Plato,* 981 F.2d 852, 858 n. 14 (5th Cir.1993) (treating *quantum meruit* damages as equitable relief); *see also United States Gypsum Co. v. National Gypsum Co.,* 352 U.S. 457, 478, 77 S.Ct. 490, 1 L.Ed.2d 465 (1957) (Black, J., dissenting) (hinting that *quantum meruit* is an action in equity by stating that recovery under that theory runs counter to the equitable doctrine of "unclean hands"). *But see Mertens v. Hewitt Assocs.,* 508 U.S. 248, 255, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) ("Money damages are, of course, the classic form of *legal* relief."); *cf. Reich v. Continental Cas. Co.,* 33 F.3d 754, 756 (7th Cir.1994) (dictum) (In seeking restitution, "[plaintiff] was seeking not a profit, but merely a receipt, an insurance premium, net of some expenses; to call this a 'profit,' it could be argued, would convert every suit for the price of a contract into a suit for restitution, contrary to the law.").

5. *Smith v. Wade,* 461 U.S. 30, 93, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983) (O'Connor, J., dissenting).

6. 517 U.S. 706, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996).

jurisdiction were enacted against a background of traditional principles that included a court's ability to abstain in certain circumstances.[7] Thus, "it has long been established that a federal court has the authority to decline to exercise its jurisdiction when it is asked to employ its historic powers as a court of equity."[8] And more specifically, "the power to dismiss under the *Burford* doctrine . . . derives from the discretion historically enjoyed by courts of equity."[9] Thus, the appropriate issue to be resolved is whether courts of equity historically heard claims of *quantum meruit*.

Given the Supreme Court's historical emphasis, it is my perception that the focus should be upon the origin of the relief and its position at the time the federal judicial system was created, not how the cause of action has since evolved.[10] The roots of *quantum meruit* are in the courts of equity;[11] claims for *quantum meruit* appeared in those courts before the cause of action could be pursued at law. Claims for

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7. *Id.*, at 716-17, 116 S.Ct. 1712.

8. *Id.*, at 717, 116 S.Ct. 1712 (internal quotations omitted).

9. *Id.*, at 727-28, 116 S.Ct. 1712.

10. It appears that courts competed for jurisdiction, *see* JOHN P. DAWSON ET AL., CASES AND COMMENT ON CONTRACTS 107 (6th ed. 1993) ("Since judges derived their income from litigants' fees, it is not surprising that competition for judicial business developed . . . ."), so emphasis on the evolution of the cause of action does not seem appropriate.

11. JAMES BARR AMES, LECTURES ON LEGAL HISTORY 156 (1913).

quantum meruit were pursued in the courts of equity at the birth of our judicial system.[12] Thus, despite some indications, historically speaking, that *quantum meruit* was a legal cause of action,[13] I am not prepared to dispositively rule that *quantum meruit* is a legal cause of action.

II.

Having personally concluded that a federal court sits in equity when hearing a claim for *quantum meruit*,[14] I continue

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12. Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 Harv. L.Rev. 917, 934 (1974) ("As late as the turn of the century, it was also the prevailing practice in America to sue in *indebitatus assumptsit* for an express contract and for counts in both *indebitatus* and *quantum meruit* to be 'usually joined in the declaration; so that on failure of proof of an express debt or price, the Plf. may resort *ad debitum equitatis*,' that is, to an equitable action in *quantum meruit*.") (footnote omitted, italics added) (quoting AMERICAN PRECEDENTS OF DECLARATIONS 95 (B. Perham ed. 1802)).

13. *See* J.L. Barton, *Contract and* Quantum Meruit: *The Antecedents of* Cutter v. Powell, 8 J. Legal Hist. 48 (1987); Horwitz, *supra* note 12, at 936 (discussing the *jury's* power to set a reasonable price in *quantum meruit*); *see also* RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 4 cmt. e, at 21 (1937) ("Although ordinarily such money judgment is obtained by an action at law, a decree for money will sometimes be rendered by a court of equity.").

14. Besides *quantum meruit*, Webb also pursued causes of action for breach of contract and for suit on sworn account, but these *legal* claims do not undermine the conclusion that the district court was sitting in equity. *Quackenbush*, 517 U.S. at 730, 116 S.Ct.

(Cont'd)

with the *Burford* analysis. The Supreme Court describes the *Burford* abstention doctrine as follows:

> Where timely and adequate state court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.[15]

The district court abstained under the second noted circumstance,[16] and, in doing so, in my opinion, it did not abuse its discretion.

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1712 ("We have not strictly limited abstention to equitable cases, . . . but rather have extended the doctrine to all cases in which a federal court is asked to provide some form of discretionary relief.") (internal quotations and citations omitted).

15. *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, 361, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989) (internal quotations and citations omitted).

16. *Webb v. B.C. Rogers Poultry, Inc.*, No. A-98-CA-005-SS (W.D.Tex. Feb. 19, 1998) ("Abstention is appropriate in this case, for if this Court were to exercise federal jurisdiction, it could well interfere with the State of Texas' efforts to effect a coherent policy

(Cont'd)

Appendix A

Prior to *Quackenbush*, this court and other courts consistently had approved *Burford* abstention in actions involving an insurance company that, in turn, was involved in ongoing state delinquency proceedings.[17] Being persuaded that the holding of *Quackenbush* does not torpedo the district court's decision to abstain, I briefly reflect only on the remaining analysis because of the solid background of precedent upholding *Burford* abstention in similar situations.

A.

Texas' regulation of the insurance industry is "a matter of substantial public concern." Congress manifestly considers such regulation a matter of public concern.[18] Precedent teaches that this concern is substantial.[19]

(Cont'd)

on a matter of public concern, that is, the collection of assets of an insolvent insurer through a state district court receivership proceeding wherein the state district court retains continuing jurisdiction over the liquidation proceedings. Failure to abstain could lead to removal of cases to federal court and possible changes of venue, leaving the receiver facing litigation in several forums and under different circumstances. This would be detrimental to the overall scheme of the liquidation proceedings in Texas when an insurance company becomes insolvent.").

17. *Munich Am. Reins. Co. v. Crawford*, 141 F.3d 585, 589 n. 2 (5th Cir.1998) (collecting cases), *cert. denied*, __ U.S. __, 119 S.Ct. 539, 142 L.Ed.2d 448 (1998).

18. 15 U.S.C. § 1011 ("Congress hereby declares that the continued regulation . . . by the several States of the business of insurance is in the public interest. . . .").

19. *See Martin Ins. Agency, Inc. v. Prudential Reins. Co.*, 910 F.2d 249, 255 (5th Cir.1990) (necessarily finding the concern (Cont'd)

Appendix A

B.

Texas has established a coherent policy regulating the insurance industry. It has formulated a complex and comprehensive scheme involving numerous actors, including the Department of Insurance, the Commissioner of Insurance, as well as the District Court of Travis County. Under Texas law, the governor, with the advice and consent of the senate, appoints a Commissioner of Insurance who is charged with the primary responsibility of administering, enforcing, and executing provisions of the Insurance Code.[20] Decisions by the Commissioner may be challenged by interested parties in the District Court of Travis County, "and not elsewhere."[21] The Attorney General for the State of Texas is charged with representing and advising the Commissioner in all legal matters.[22]

Texas' comprehensive scheme also quite appropriately covers matters concerning those insurance companies that become insolvent.[23] Particular financial considerations must

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"substantial" because it was "appropriate to abstain on Burford abstention grounds"); *see also Lac D'Amiante du Quebec, Ltee v. American Home Assurance Co.*, 864 F.2d 1033, 1045 (3d Cir.1988) ("essential state concern").

20. TEX. INS.CODE ANN. ART. 1.09(a), (b).

21. TEX. INS.CODE ANN. ART. 1.04(a).

22. TEX. INS.CODE ANN. ART. 1.09-1(a).

23. *See generally* TEX. INS.CODE ANN. ARTS. 21.28, 21.28-A; *El Paso Elec. Co. v. Texas Dep't of Ins.*, 937 S.W.2d 432, 434-35 (Cont'd)

be met before an insurance company may be incorporated in Texas,[24] and the Department of Insurance is charged with monitoring the continuing performance of insurance companies.[25] If the department determines that an insurance company's financial position has dipped below a prescribed level, the Commissioner must notify the company of this determination and provide the company with a list of requirements, compliance with which will absolve the earlier departmental determination.[26] If, after a specified period of time, the company has not met the requirements set forth by the Commissioner and other criteria have not been met, the Commissioner must notify the Attorney General who may apply to any Travis County court for remedial action, including the appointment of a receiver.[27] Texas law charges an appointed receiver with the duty of *conducting* the

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(Tex.1996) ("Article 21.28 of the Texas Insurance Code sets forth a comprehensive scheme for the liquidation, rehabilitation, and reorganization of insolvent insurers."); *see also* TEX. INS.CODE ANN. ART. 21.28 § 16 ("In the event of conflict between the provisions of this Article and the provisions of any existing law, the provisions of this Article shall prevail, and all laws, or parts of law, in conflict with the provisions of this Article, are hereby repealed to the extent of such conflict.").

24. TEX. INS.CODE ANN. ART. 2.02.

25. TEX. INS.CODE ANN. ART. 1.10.

26. TEX. INS.CODE ANN. ART. 21.28-A.

27. TEX. INS.CODE ANN. ART. 21.28-A.

business of the delinquent insurer and *conserving* the assets and *protecting* the rights of policyholders and claimants.[28] Additionally, Texas law specifies where the proceeds collected by the receiver shall be held.[29] Finally, Texas law specifies that the exclusive venue for delinquency proceedings shall be in Travis County.[30] It is abundantly clear that Texas indeed has established a coherent policy in this area.

C.

I find no basis for suggesting that the district court abused its discretion in concluding that federal review of the questions presented in this case and similar cases would be disruptive of Texas' efforts to effectuate its coherent policy. Congress delegated the regulation of the business of insurance to the states,[31] and Texas has created a complex

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28. TEX. INS.CODE ANN. ART. 21.28 § 2(e).

29. TEX. INS.CODE ANN. ART. 21.28 § 2(h) ("Except as provided by this subsection, all money collected by the receiver shall be forthwith deposited into the Texas Treasury Safekeeping Trust Company. . . .").

30. TEX. INS.CODE ANN. ART. 21.28 § 2(i) ("Exclusive venue of delinquency proceedings shall be in Travis County, Texas.").

31. 15 U.S.C. § 1012(a) ("The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."). *But see* 15 U.S.C. § 1012(b) ("No Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance. . . .").

and comprehensive scheme to do exactly that. The Texas legislature has concentrated judicial review of insurance proceedings in Travis County, and consequently those courts, like the Department of Insurance and the Commissioner of Insurance, have developed a specialized knowledge regarding these proceedings.[32] In my view, reversing the district court and allowing this case to continue in federal court inappropriately "usurp[s]" Texas' control over the liquidation proceeding.[33]

Finally, Texas requires the receiver to "take such steps as may be necessary to *conserve* the assets . . . for the purpose of liquidating . . . the affairs of the insurer."[34] By holding that the federal district court possessed jurisdiction over this case, the majority potentially sacrifices one of the chief purposes of the Texas regulatory scheme by effectively requiring the "dissipation of the insolvent company's funds"[35] likely to result from litigation conducted outside Travis County and away from the court with the responsibility for this insurance company salvage operation.

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32. *See Burford,* 319 U.S. at 325-27, 63 S.Ct. 1098.

33. *Barnhardt Marine Ins., Inc. v. New England Int'l Surety of Am., Inc.,* 961 F.2d 529, 532 (5th Cir.1992).

34. TEX. INS.CODE ANN. ART. 21.28 § 2(e) (emphasis added).

35. *Munich Am. Reins. Co.,* 141 F.3d at 593 ("[C]onsolidation prevents the unnecessary and wasteful dissipation of the insolvent company's funds that would occur if the receiver had to defend unconnected suits in different forums across the country.").

Splintering a portion of this on-going proceeding and insisting on jurisdiction herein for the federal district court unduly threatens the scheme enacted by Texas as specifically authorized by Congress. As our courts have so forcefully noted: " 'in instances, where states have . . . formulat[ed] complex and specialized administrative and judicial schemes to regulate insurers, especially the liquidation of insolvent insurers,' the federal court should abstain from exercising jurisdiction in disputes occurring in the larger context of state liquidation proceedings."[36] I am in absolute agreement with this statement.

III.

In sum, we should conclude that *quantum meruit* historically was, and therefore should be deemed to be, an equitable action and that the district court did not abuse its discretion in abstaining under *Burford*. I would affirm the judgment appealed.

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36. *Martin Ins. Agency, Inc.*, 910 F.2d at 254 (quoting *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 703 (10th Cir.1988)); *cf. Sierra Club v. City of San Antonio*, 112 F.3d 789, 796 (5th Cir.1997) ("*Burford* abstention is particularly appropriate where by proceeding the district court would have risked reaching a different answer than the state institutions with greater interest in and familiarity with such matters.") (internal quotations and citations omitted). True, the district court noted that "the case at bar may be a simple determination of what, if any, premium is owed by the defendants to the receiver acting through his appointed authority." *Webb v. B.C. Rogers Poultry, Inc.*, No. A-98-CA- 005-SS (W.D.Tex. Feb. 19, 1998). Our precedent, nonetheless, reveals that "disruption" may stem either from unsettled law or from the application of settled law to complex, local facts. *Wilson v. Valley Elec. Membership Corp.*, 8 F.3d 311, 314-15 (5th Cir.1993). And on the record before this court, I cannot conclude that the district court abused its discretion in abstaining.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, DATED AND FILED FEBRUARY 19, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NO. A 98 CA 005 SS

JACK M. WEBB, SPECIAL DEPUTY RECEIVER FOR EMPLOYERS NATIONAL INSURANCE COMPANY IN RECEIVERSHIP

VS.

B.C. ROGERS POULTRY, INC. and B.C. ROGERS PROCESSORS, INC.

ORDER

BE IT REMEMBERED on this the 19th day of February 1998 the Court reviewed the file in the above-styled cause and specifically the Motion to Abstain and Remand [#6] filed by the plaintiff Jack M. Webb, Special Deputy Receiver for Employers National Insurance Company in Receivership and the response of the defendants [#7 filed February 17, 1998], and thereafter the Court makes the following findings and orders:

On February 11, 1994, the 53rd Judicial District Court of Travis County, Texas, in cause number 94-00950 styled *The State of Texas, Plaintiff v. Employers National Insurance*

Company, Defendant, entered a permanent injunction and order appointing permanent receiver. The 53rd Judicial District Court's order was made pursuant to the specific provisions of the Texas Insurance Code and the order appointed the Commissioner of Insurance of the State of Texas as the permanent receiver of Employers National Insurance Company and Jack Webb as the Special Deputy Receiver. The order further found that the defendant Employers National Insurance Company was "insolvent and in a hazardous financial condition" and entered specific injunctive relief relating, *inter alia*, to policy holders of Employers National Insurance Company. It is alleged that the defendants in this case would constitute policy holders and, therefore, the injunctive relief applied directly to them requiring a disclosure of all properties of Employers National Insurance Company and the immediate surrender of all properties to the permanent receiver. The injunctive order of the 53rd Judicial District Court continues jurisdiction in that court authorizing the permanent receiver to, *inter alia*, take over and collect all assets of Employers National Insurance Company and the court retained jurisdiction through final liquidation of Employers National Insurance Company, including the sale of its charter.

Pursuant to the order of the 53rd Judicial District Court, Jack M. Webb, Special Deputy Receiver for Employers National Insurance Company in Receivership, filed suit against the defendants herein in the 53rd Judicial District Court of Travis County in an effort to collect assets of Employers National Insurance Company, specifically premiums for insurance coverage allegedly owed by the defendants for policies issued by Employers National

Insurance Company. Jack Webb, the Special Deputy Receiver, may have filed other lawsuits in the 53rd Judicial District Court to obtain assets of the insolvent insurer; this case at bar may be one of many lawsuits filed in the 53rd Judicial District Court of Travis County to comply with the liquidation order entered by the 53rd Judicial District Court of Travis County.

The defendants were served on December 9, 1997, with process out of the 53rd Judicial District Court of Travis County, and on January 5, 1998, filed a notice of removal in the state court and subsequently filed the removal of this cause to this Court.

The receiver seeks abstention and remand under three theories. First, he contends the Court should abstain from exercising jurisdiction over this insurance receivership matter under the doctrine of *Burford v. Sun Oil Co.*, 63 S. Ct. 1098 (1943). The defendants counter that this lawsuit does not involve complex issues of a complicated regulatory scheme and is simply a matter of contract between parties wherein a determination of an amount of insurance premiums, if any, are owed by the defendants.

The second ground for remand is that the defendants technically failed to comply with the removal statute, but the Court finds this argument is totally without merit and dismisses this contention offhand.

The third theory for remand is that this Court should avoid any conflict with a permanent injunction entered by the receivership court. Again, the Court rejects this contention out of hand.

Appendix B

As the parties both specifically point out, the Court has heretofore held, in dicta, that a case under these circumstances should be remanded to the state court. *See, Georgia D. Flint, as Permanent Receiver of Texas Employers Insurance Association v. Nolan H. Brunson, Inc.*, A 93 CA 651. It may well be that the only issue in the case at bar may be a simple determination of what, if any, premium is owed by the defendants to the receiver acting through his appointed authority. However, this lawsuit is simply one of many efforts the receiver engages in to obtain the assets of an insolvent insurance company and to protect the policyholders and the citizens of the State of Texas from injury. The State of Texas is the primary authority for regulating the insurance industry in the State of Texas, and the plaintiff Jack Webb, as Special Deputy Receiver, has the court-appointed authority to protect the State of Texas from the insolvency of Employers National Insurance Company, which includes the obtaining of any assets of Employers National Insurance Company. Abstention is appropriate in this case, for if this Court were to exercise federal jurisdiction, it could well interfere with the State of Texas' efforts to effect a coherent policy on a matter of public concern, that is, the collection of assets of an insolvent insurer through a state district court receivership proceeding wherein the state district court retains continuing jurisdiction over the liquidation proceedings. Failure to abstain could lead to removal of cases to federal court and possible changes of venue, leaving the receiver facing litigation in several forums and under different circumstances. This would be detrimental to the overall scheme of the liquidation proceedings in Texas when an insurance company becomes insolvent. Therefore, the Court will remand this case to the 53rd Judicial District Court of

Appendix B

Travis County wherein the liquidation orders have been entered and all suits for collection of assets are to be maintained.

IT IS ORDERED that the Motion to Abstain and Remand is GRANTED for the reasons stated in this opinion and this cause is remanded to the 53rd Judicial District Court of Travis County, and each party shall absorb his or its own costs.

SIGNED on this the 19th day of February 1998.

s/ Sam Sparks
UNITED STATES DISTRICT JUDGE

APPENDIX C — PERMANENT INJUNCTION AND ORDER APPOINTING PERMANENT RECEIVER OF THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS FOR THE 53RD JUDICIAL DISTRICT DATED FEBRUARY 11, 1994

No. 94-00950

IN THE DISTRICT COURT OF
TRAVIS COUNTY, TEXAS
53RD JUDICIAL DISTRICT

THE STATE OF TEXAS,

Plaintiff

VS.

EMPLOYERS NATIONAL INSURANCE COMPANY,

Defendant

PERMANENT INJUNCTION AND ORDER
APPOINTING PERMANENT RECEIVER

On this day came to be heard the Application for PERMANENT INJUNCTION AND ORDER APPOINTING PERMANENT RECEIVER filed by the State of Texas. The State of Texas appeared by and through its Attorney General, Dan Morales, and EMPLOYERS NATIONAL INSURANCE COMPANY (sometimes hereinafter referred to as "DEFENDANT"), though properly served and cited to appear, did not appear.

Appendix C

The Application requests that a Permanent Injunction be issued against DEFENDANT and that the Commissioner of Insurance be appointed as the Permanent Receiver for EMPLOYERS NATIONAL INSURANCE COMPANY.

I.
FINDINGS

1) The Court finds that it has jurisdiction of the parties and over the subject matter herein, and the Court, after considering the Plaintiff's verified claim, is of the opinion and finds that the law and the facts are what the Plaintiff has alleged in its duly verified claim and that Plaintiff is entitled to a PERMANENT INJUNCTION AND ORDER APPOINTING PERMANENT RECEIVER as granted herein.

2) The Court finds that the Plaintiff, through its Attorney General, Dan Morales, under the authority granted to him by the Constitution and laws of this State and at the request of the Commissioner of Insurance of the State of Texas, has a probable right and probably will prevail upon final hearing of this action and that without the issuance of this Permanent Injunctive relief, the Plaintiff will probably suffer irreparable injury as set forth herein. There is no adequate remedy at law.

3) The Court finds that DEFENDANT is insolvent and in a hazardous financial condition and is not in compliance with TEX. INS. CODE ANN. arts. 1.10, §5, 2.01, 2.02, and 2.20 (Vernon Supp. 1993). The Court further finds that the continued operation of DEFENDANT will be

hazardous to its insureds and creditors, and that unless permanently enjoined, it will continue to operate in violation of the laws of this State and that it will continue to create debts and obligations and to deplete the assets of DEFENDANT, all contrary to the best interests of its policyholders, creditors and the general public and that by reason of these premises, immediate and irreparable injury, loss and damage will result to the policyholders and creditors.

4) The Court further finds that unless DEFENDANT is permanently enjoined, the assets of DEFENDANT may be subjected to claims or illegal preferences, to the immediate and irreparable injury of its policyholders and creditors.

5) Because of the foregoing, the Court finds that there exists an imperative and immediate necessity to enjoin DEFENDANT from conducting any business of DEFENDANT as enjoined herein and to appoint the Commissioner of Insurance of the State of Texas as Permanent Receiver of the affairs of EMPLOYERS NATIONAL INSURANCE COMPANY in order to manage, maintain, and preserve the affairs of DEFENDANT during the pendency of these proceedings and to wind-up and liquidate the property and business of DEFENDANT.

6) The Court further finds that the Permanent Receiver is vested by operation of law with title to all property and assets of DEFENDANT, and that the Permanent Receiver succeeds to all rights of DEFENDANT, including, but

not limited to, the rights of DEFENDANT as customer of any financial institutions.

7) The Court further finds that DEFENDANT was duly and properly served and notified of this hearing.

8) It is the intent of this Court, by entry of this Order, that this is a Final Order of Liquidation, based on this Court's finding of insolvency. The purpose of this Order is to allow a determination that the hazard caused by DEFENDANT'S insolvency warrants this Final Liquidation Order.

9) Should this Final Order of Liquidation be rescinded at any time, and the institution of receivership proceedings be reversed, all Insurance Guaranty Association's will be required to be repaid in full for all administrative expenses and all covered claims paid. This reimbursement will need to be prior to a release from receivership.

II.
PERMANENT INJUNCTION

It is ORDERED that the Clerk of this Court shall issue a Permanent Injunction against the persons and entities named below, with the following force and effect:

TO EMPLOYERS NATIONAL INSURANCE COMPANY, ITS DIRECTORS AND FORMER DIRECTORS (INCLUDING, BUT NOT

LIMITED TO, Wirt Davis, II, William Burres Head, III, Tyrus Raymond John, James Price Mitchell, Stephen Blancett Caswell Lanier Dunlap, John Clifton Holmgreen, William Thomas Jones, Charles Bascom Peterson, Jr., Gerald Wayne Fronterhouse, William Henry Huff, III, William Charles McCord and Benjamin Johnson Pittman, Jr.); and ITS OFFICERS AND FORMER OFFICERS (INCLUDING, BUT NOT LIMITED TO, William Henry Huff, III, Thomas Reddick Coffield, Jr., Kevin Wayne Uzzle, Harry Travis Bowen, Jr., Michael James Klink, Kenneth Anthony Perez, Patrick Lewis Whatley, Allen Charles McDonald, William Henry Propes, Joseph Hector Willems, William Howard Haun and Randell Travis Mickan); ATTORNEYS; ACCOUNTANTS; MANAGERS; MANAGING GENERAL AGENTS; REPRESENTATIVES; LOCAL RECORDING AGENTS; EMPLOYEES; SERVANTS; STOCKHOLDERS; THIRD PARTY ADMINISTRATORS; ADJUSTERS; MEMBERS; TRUSTEES; POLICYHOLDERS; ASSOCIATES; AGENTS (ALL OF SUCH PERSONS HEREINAFTER CALLED "AGENTS"); AND THOSE ACTING IN CONCERT WITH THEM;

Appendix C

YOU AND EACH OF YOU are hereby DIRECTED AGAINST:

1) Doing, operating, and conducting any business of DEFENDANT under any charter, permit, license, power or privilege, belonging to, or heretofore issued by, or to DEFENDANT, or exercising any direction, control or influence over said business of DEFENDANT;

2) Wasting, disposing of, using, transferring, selling, assigning, canceling, hypothecating, withdrawing, or allowing to be withdrawn or concealing, in any manner, or in any way, any property of DEFENDANT, also including, but not limited to, that property which has been acquired, purchased or paid for by DEFENDANT, whether such property is real, personal, or mixed, of any kind, or nature, wheresoever located, all of which property is hereby placed in custodia legis. Such property shall also include any claims or causes of action belonging to, owned by, in the possession of, or claimed by DEFENDANT which DEFENDANT might have against any person, firm, association, or corporation, all of which property is hereby placed in custodia legis;

3) Disposing of any account, debt, deposit, share account, trust account, or any other property you may own, owe to, or hold for the benefit of DEFENDANT, or any account held individually, jointly, or severally for DEFENDANT, whether such account, debt, deposit, share account, trust account, or any other asset is owned, or held for DEFENDANT in the name of, or for the benefit of DEFENDANT, or under any other name, all of which property is hereby placed in custodia legis;

4) Removing from the jurisdiction of this Court, or from the place of business of DEFENDANT, any office equipment, furniture or fixtures, books, records, or any other property of any kind or nature whatsoever, real and personal, belonging to, claimed, or owned by DEFENDANT, all of which property is hereby placed in custodia legis;

5) Doing anything, directly or indirectly, to prevent the Permanent Receiver or his designees from gaining access to, acquiring, examining or investigating any books, documents, records or other materials concerning DEFENDANT or its affairs and property under whatever name they may be found. Such documentary material shall include, but not be limited to, records and property held by banks, savings and loan associations, trust companies, credit unions or any other entity or depository institution; and

6) Interfering, in any way, with these proceedings or the lawful acts of the Permanent Receiver or his designees, and from commencing, or prosecuting any action or appeal or arbitration, including administrative proceedings or obtaining any preference, judgment, attachment, garnishment, or other lien, or from the making of any levy against DEFENDANT, or against its property, or any part thereof, except by doing so in the receivership proceedings herein, and from asserting any claims against DEFENDANT or against the Permanent Receiver thereof, except through these receivership proceedings.

Appendix C

YOU AND EACH OF YOU are further specifically ORDERED to make available and disclose to the Permanent Receiver or his designees the nature, amount, and location of any and all of the property of DEFENDANT, including, but not limited to, any of the property listed in subparagraphs 3 through 6 above, and to immediately surrender all such property to the Permanent Receiver or his designees.

> TO ANY AND ALL BANKS, (INCLUDING, BUT NOT LIMITED TO, NationsBank of Texas; Texas Commerce Bank; Frost National Bank; BancCentral; American Bank; Security Pacific National Bank, Pasadena, California; Bank of America, Concord, California; Bank One; Liberty National Bank & Trust, Oklahoma City, Oklahoma; Overton Park National Bank; TEAM Bank; First State Bank; First City Bank; and Bank of America, Los Angeles, California); ALL OTHER BANKS, SAVINGS AND LOAN ASSOCIATIONS; TRUST COMPANIES, CREDIT UNIONS, WELFARE TRUSTS OR ANY OTHER FINANCIAL INSTITUTIONS;

YOU AND EACH OF YOU are hereby DIRECTED AGAINST:

1) Disposing of, using, releasing, transferring, selling, withdrawing, allowing to be withdrawn, assigning, canceling, hypothecating, or concealing, in any manner,

or in any way, any property of DEFENDANT, including, but not limited to, any books, records, equipment, money, accounts receivable, stocks, bonds, assets, policies of insurance, notes, and funds of DEFENDANT, whether such property is real, personal, or mixed, of any kind, or nature, wheresoever located, all of which property is hereby placed in custodia legis;

2) Disposing of any account, debt, deposit, share account, trust account, or any other property you may own, owe to, or hold for the benefit of DEFENDANT, or any account held individually, jointly, or severally for DEFENDANT, whether such account, debt, deposit, share account, trust account, or any other asset is owned, or held for DEFENDANT, in the name of, or for the benefit of DEFENDANT, or under any other name, all of which property is placed in custodia legis;

3) Doing anything, directly or indirectly, to prevent the Permanent Receiver or his designees from gaining access to, acquiring, examining or investigating any books, documents, records or other material concerning DEFENDANT, or its affairs and property under whatever name they may be found. Such documentary material shall include, but is not limited to, records and property held by banks, savings and loan associations, trust companies, credit unions or any other entity or depository institution, as well as any bank accounts, or any other assets into which have been transferred, deposited, and or placed funds, or other assets belonging to or payable to DEFENDANT, or to which DEFENDANT may have claim or title regardless of whatever name such accounts,

debts, deposits, share accounts, safe deposit boxes, trust accounts, or other assets are held;

4) Interfering, in any way, with these proceedings or the lawful acts of the Permanent Receiver or his designees, and from commencing, or prosecuting any action or appeal or arbitration, including administrative proceedings or obtaining any preference, judgment, attachment, garnishment, or other lien, or from the making of any levy against DEFENDANT, or against its property, or any part thereof, except by doing so in the receivership proceedings herein, and from asserting any claims against DEFENDANT or against the Permanent Receiver thereof, except in the receivership proceedings herein; and

5) Transacting any business of the DEFENDANT in any manner whatsoever except pursuant to the specific instructions of the Permanent Receiver or his designees; provided, however, that, pursuant to TEX. INS. CODE ANN. art. 21.28. §3(A) (Vernon Supp. 1993), all drafts or checks written or issued on bank account number 139-000-1594 with NationsBank of Texas - Dallas, N.A. shall be processed and paid as usual, and this one bank account shall not be frozen as a result of this Injunction Order.

YOU AND EACH OF YOU are further specifically DIRECTED to make available and disclose to the Permanent Receiver or his designees the nature, amount, and location of any and all of the property of DEFENDANT, all information relating to the property and the account(s) of

DEFENDANT including, but not limited to, any of the property listed in subparagraphs 1 and 2 above, and to immediately surrender all such property to the Permanent Receiver or his designees. The Court further specifically finds and orders that the Permanent Receiver is vested by operation of law with title to the rights of DEFENDANT as the customer of any financial or depository institution.

TO ANY AND ALL OTHER PERSONS, ASSOCIATIONS, CORPORATIONS, OR ANY OTHER LEGAL ENTITIES INCLUDING, BUT NOT LIMITED TO, CLAIMANTS, ATTORNEYS AND THE U.S. POSTMASTER;

YOU AND EACH OF YOU are hereby DIRECTED AGAINST:

1) Disposing of, using, releasing, transferring, selling, withdrawing, allowing to be withdrawn, assigning, canceling, hypothecating, or concealing, in any manner, or in any way, any property of DEFENDANT, including, but not limited to, any books, records, equipment, money, accounts receivable, stocks, bonds, assets, policies of insurance, notes, and funds of DEFENDANT, whether such property is real, personal, or mixed, of any kind, or nature, wheresoever located, all of which property is hereby placed in custodia legis;

2) Disposing of any account, debt, deposit, share account, trust account, or any other property you may own, owe to, or hold for the benefit of DEFENDANT, or any

account held individually, jointly, or severally for DEFENDANT whether such account, debt, deposit, share account, trust account, or any other asset is owned, or held for DEFENDANT, in the name of, or for the benefit of DEFENDANT or under any other name, all of which property is placed in custodia legis;

3) Doing anything, directly or indirectly, to prevent the Permanent Receiver or his designees from gaining access to, acquiring, examining or investigating any books, documents, records or other material concerning DEFENDANT or its affairs and property under whatever name they may be found. Such documentary material shall include, but is not limited to, records and property held by banks, savings and loan associations, trust companies, credit unions, depository institutions, attorneys or any other entity, as well as any bank accounts or any other assets into which have been transferred, deposited, and or placed funds, or other assets belonging to or payable to DEFENDANT, or to which may have claim or title regardless of under whose name such accounts, debts, deposits, share accounts, safe deposit boxes, trust accounts, or other assets are held;

4) Interfering, in any way, with these proceedings or the lawful acts of the Permanent Receiver or his designees, and from commencing, or prosecuting any action or appeal or arbitration, including administrative proceedings, or obtaining any preference, judgment, attachment, garnishment, or other lien, or from the making of any levy against DEFENDANT, or against its property, or any part thereof, except by doing so in the

receivership proceedings herein, and from asserting any claims against DEFENDANT, the Permanent Receiver thereof, or against or through DEFENDANT'S policyholders, except in the receivership proceedings herein; and

5) Transacting any business of the DEFENDANT in any manner whatsoever.

YOU AND EACH OF YOU are further specifically DIRECTED to make available and disclose to the Permanent Receiver or his designees the nature, amount, and location of any and all of the property of DEFENDANT, including, but not limited to, any of the property listed in subparagraphs 1 and 2 above, and to immediately surrender all such property to the Permanent Receiver or his designees.

III.
APPOINTMENT OF PERMANENT RECEIVER

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the Commissioner of Insurance of the State of Texas, P. O. Box 2800, Austin, Texas 78768-2800, be, and he is hereby, appointed as Permanent Receiver of EMPLOYERS NATIONAL INSURANCE COMPANY, and granted the following duties and powers:

1) The Permanent Receiver is authorized and directed to take possession of all property and assets of the DEFENDANT as previously described herein, of whatsoever nature and wheresoever located, of any statutory or special deposits made by or for the

DEFENDANT with any officer or agency of any state or the federal government, banks, savings and loan associations, and other depositories, any and all bank deposits, collateral or the contents of any safe deposit boxes in the name of or belonging to the DEFENDANT, and to take charge of all books and records in the possession of or belonging to the DEFENDANT, including those related to the subsidiaries;

2) The Permanent Receiver is hereby granted and given all equitable powers and authority under any and all statutes and under the common law of this State authorizing the appointment of a Receiver, and particularly all of the powers and authority granted in TEX. INS. CODE ANN. art. 21.28 (Vernon Supp. 1993) and TEX. CIV. PRAC. & REM. CODE art. 64.001 et seq., (Vernon Supp. 1993) and as representative of the DEFENDANT, the policyholders, claimants and creditors, to preserve, protect, and recover any assets or property of the DEFENDANT, including claims or causes of action belonging to or that may be asserted by the DEFENDANT;

3) The Permanent Receiver is further authorized and directed to file, prosecute and defend or settle any suit or suits heretofore filed or which may hereafter be filed by or against the DEFENDANT deemed by the Permanent Receiver to be necessary to protect any of the interests of the DEFENDANT or any property affected thereby, and to preserve all property and assets of the DEFENDANT;

Appendix C

4) As provided by TEX. INS. CODE ANN. art. 21.28 (Vernon Supp. 1993), the Permanent Receiver is empowered to conduct the business of the DEFENDANT, to administer the business and operations of the DEFENDANT and to employ and pay or compensate any legal counsel, any accountants, clerks, and such assistants, as he deems necessary, and to authorize the payment of and to pay the administrative expenses of the receivership estate out of the funds or assets of the DEFENDANT in the possession of the Permanent Receiver or coming into his possession. The Permanent Receiver is additionally empowered to open any and all mail addressed to the DEFENDANT, intended for the DEFENDANT, or arriving at the address of the DEFENDANT or DEFENDANT'S Agents;

5) It is ORDERED that the Permanent Receiver appointed herein, shall be authorized to supervise, suspend, exclude or terminate any or all of the employees, officers and/or directors of the DEFENDANT, or any one of them, and to employ such necessary employees, and to pay their salaries and related reasonable and necessary fees out of the funds or assets of the DEFENDANT in the possession of the Permanent Receiver or coming into his possession, as he deems necessary in the enforcement of his duties;

6) It is ORDERED that the Permanent Receiver appointed herein shall be authorized to remove from the premises of the DEFENDANT or from the premises of any AGENT, CONTRACTOR, MANAGING AGENT OR MANAGING GENERAL AGENTS, all books and/or records which relate to or are connected with the business

of the DEFENDANT and which belong to or are in the possession of the DEFENDANT, and to secure the premises of the DEFENDANT as he deems necessary to preserve and protect the assets, books and/or records of the DEFENDANT; and

7) As provided by TEX. INS. CODE ANN. art. 21.28, §3(A) (Vernon Supp. 1993), the Permanent Receiver is empowered to immediately continue the processing and issuance of checks or drafts on bank accounts of the DEFENDANT to cover those obligations described in said statutory provisions.

The Court does not require that the Commissioner of Insurance file a bond as permitted by TEX. INS. CODE ANN. art. 21.28, §2(d) (Vernon Supp. 1993). Upon the filing of an oath that he will faithfully perform the duties of Receiver in this cause, the Permanent Receiver will be fully qualified and empowered to take charge of all of the assets and other properties of the DEFENDANT in the manner herein provided and to function as Permanent Receiver herein.

IT IS FURTHER ORDERED that this Order directing the Permanent Receiver to take possession of the affairs and assets of the DEFENDANT shall continue in full force and effect until further order of this Court. This Order shall also continue in full force and effect if and when a successor to the Commissioner of Insurance is appointed, and the new Commissioner of Insurance shall automatically become the Permanent Receiver.

Appendix C

IT IS FURTHER ORDERED that the Commissioner of Insurance, as Permanent Receiver, has designated Jack M. Webb as Special Deputy Receiver to coordinate the takeover of the assets and affairs of EMPLOYERS NATIONAL INSURANCE COMPANY, and to coordinate the liquidation of the assets and affairs of EMPLOYERS NATIONAL INSURANCE COMPANY. Pursuant to TEX. INS. CODE ANN. art. 21.28, §2(a) (Vernon Supp. 1993), Jack M. Webb as Special Deputy Receiver has all the powers of the Receiver under this PERMANENT INJUNCTION AND ORDER APPOINTING PERMANENT RECEIVER upon the filing of an oath of Special Deputy Receiver.

IT IS FURTHER ORDERED that any unexpired policies or contracts of insurance issued by DEFENDANT are canceled by entry of this Order.

IT IS FURTHER ORDERED that a claims filing deadline for all claims against the DEFENDANT is set for 11:59 p.m., C.S.T., on July 31, 1995, and all claimants are ordered to file or postmark their claims to the Special Deputy Receiver designated in this Order no later than that date and time.

IT IS FURTHER ORDERED that the Special Deputy Receiver is required to send, by first class mail to all persons reflected in the books and records of DEFENDANT as having a claim, notice of the requirement that each claimant file a proof of claim within the claims filing deadline.

IT IS FURTHER ORDERED that the Special Deputy Receiver's mailing of this notice is deemed sufficient proof of notice.

IT IS FURTHER ORDERED that the Special Deputy Receiver is authorized to publish notice of his designation as Special Deputy Receiver of DEFENDANT, of the claims filing deadline, and of the right to file claims at least once in a newspaper of general circulation in all States where DEFENDANT was licensed in order to notice unknown claimants whose names are not reflected in the books and records of DEFENDANT.

IT IS FURTHER ORDERED that this publication is deemed sufficient notice, of the claims filing deadline and the necessity of filing a proof of claim, to all unknown claimants, whose names and addresses are not reflected in the books and records of DEFENDANT.

IV.
OTHER ORDERS

IT IS FURTHER ORDERED that anyone over the age of 18 who is not a party to nor interested in the outcome of this suit may serve all citations and notices in this cause.

No bond being required by the State of Texas, this Permanent Injunction shall issue and become effective immediately after the filing of the oath, and the Commissioner of Insurance, as Permanent Receiver, shall carry out his duties in accordance with the terms of this Order.

IT IS FURTHER ORDERED that the State of Texas and the Attorney General of Texas recover all reasonable attorneys' fees and Court costs, as class 3 claim under TEX. INS. CODE ANN. art. 21.28, §8, pursuant to TEX. CIV.

Appendix C

PRAC. & REM. CODE ANN. §66.003 and TEX. GOV'T. CODE §402.006; such fees and costs being in the amount of five hundred and no/100 dollars.

IT IS FURTHER ORDERED that the Court grants the Texas Property and Casualty Insurance Guaranty Association access to all books, documents, records or other materials necessary for the processing and payment of claims for which they are statutorily responsible.

IT IS FURTHER ORDERED that the Permanent Receiver is authorized to negotiate and enter into one or more contracts to sell the charter and any related rights of DEFENDANT, on terms acceptable to him in his sound discretion, and to consummate such sale(s) upon and subject to the approval of this Court pursuant to hearing in this receivership case and of the Texas Department of Insurance, with this Court further retaining jurisdiction to determine all rights, titles, liens, and interests in such charter(s) and related rights and likewise in any proceeds of sale(s).

All of the foregoing is subject to further orders of this Court.

SIGNED, at Austin, Travis County, Texas on this the 11th day of February, 1994, at 1:35 o'clock p.m.

s/ Margaret A. Cooper
DISTRICT JUDGE PRESIDING

APPENDIX D — RELEVANT STATE STATUTE

TEX. INS. CODE art 21.28

Art. 21.28. Liquidation, Rehabilitation, Reorganization or Conservation of Insurers

Definitions

Sec. 1. For the purposes of this Article:

(a) "Insurer" means and includes capital stock companies, reciprocal or interinsurance exchanges, Lloyd's associations, fraternal benefit societies, mutual and mutual assessment companies of all kinds and types, statewide assessment associations, local mutual aids, burial associations, county and farm mutual associations, fidelity, guaranty and surety companies, trust companies organized under the provisions of Chapter 7 of Texas Insurance Code of 1951, and all other organizations, corporations, or persons transacting an insurance business, unless such insurers are by statute specifically, by naming this Article, exempted from the operation of this Article.

(b) "Delinquency proceeding" means any proceeding commenced in any court of this State against an insurer for the purpose of liquidating, rehabilitating, reorganizing or conserving such insurer.

(c) "Assets" means all property, real or personal, whether specifically mortgaged, pledged, deposited, or otherwise encumbered for the security or benefit of specified persons, or a limited class or classes of persons. The word "assets," as used in this Article, includes all deposits and funds of a special or trust nature.

(d) "Liquidator" means "receiver." The term includes the commissioner of insurance or the person designated by the commissioner of insurance to act as special deputy receiver.

(e) "Board" means the State Board of Insurance of the State of Texas, or the Commissioner of Insurance as applicable under Article 1.02 of this code.

(f) "Court," unless the same clearly appears to the contrary from the text of this article, means the court in which the delinquency proceeding is pending.

(g) "Person" means an individual, association, corporation, partnership, or other private legal entity.

General procedures

Sec. 2. (a) Receiver Taking Charge; Commissioner and Powers and Duties. Whenever under the law of this State a court of competent jurisdiction finds that a receiver should take charge of the assets of an insurer domiciled in this State, the commissioner of insurance or a person designated by the commissioner under contract shall act as receiver. The receiver shall forthwith take possession of the assets of such insurer and deal with the same in the person's own name as receiver or in the name of the insurer as the court may direct. The receiver has the powers specified in this code. A person designated by the commissioner to act as special deputy receiver under contract is subject to the performance standards imposed by this subsection. It is the intent of the legislature that oversight of the special deputy receivers

and guaranty associations shall be conducted by the commissioner. The commissioner shall use a competitive bidding process in the selection of special deputy receivers and shall establish specifications for the position of special deputy receiver. The special deputy receiver shall submit monthly written reports to the court and commissioner that state the special deputy receiver's business plan for receivership, including expenses incurred in administering the receivership during the preceding month and an estimate of those expenses for the succeeding month. The report must include a cost-benefit analysis on the expenditure of funds other than funds spent for the payment of claims. The business plan report must include a budget of monthly expenses that explains any variation from the original projection. The business plan report must include a list of any lawyers or law firms that offered to or did represent the special deputy receiver in relation to its duties under this article, and any hours billed or fees paid to a lawyer or law firm that represented the special deputy receiver. The special deputy receiver shall submit the business plan report to the attorney general on a quarterly basis, and the attorney general may make recommendations to the commissioner based on the report. In addition to the business plan report, the special deputy receiver shall submit a monthly report to the commissioner relating to the special deputy receiver's activities in administering the receivership. Upon written application by the special deputy receiver and with approval of the commissioner, the court may suspend the requirement for monthly reports or require reports less frequently based upon a showing that the costs of such reports exceed the benefit derived from their filing.

(b) Title in Receiver. The property and assets of such insurer shall be in the custody of the court as of the date of the commencement of such delinquency proceedings. The said receiver and his successors in office shall be vested by operation of law with the title to all of the property, contracts, and rights of action of such insurer, wherever located, as of the date of entry of the order directing possession to be taken. Such title of the receiver shall relate back to the date of the commencement of the delinquency proceedings unless the court shall otherwise provide. A contractual lien or statutory landlord's lien under Chapter 54, Property Code, that arises after the date of the commencement of the delinquency proceedings is secondary and inferior to the rights of the receiver and his successors in office. The filing or recording of such an order in any record office of the State shall impart the same notice as would be imparted by a deed, bill of sale, or other evidence of title duly filed or recorded by such insurer.

(c) Rights Fixed. The rights and liabilities of any such insurer and of its creditors, policyholders, members, officers, directors, stockholders, agents, and all other persons interested in its estate, shall, unless otherwise directed by the court, be fixed as of the date of the commencement of the delinquency proceedings, subject, however, to the provisions of Section 3 with respect to the rights of claimants holding unliquidated or undetermined claims or demands and as otherwise expressly provided in this Article.

(d) Bonds. The receiver shall be responsible for all assets coming into his possession. The court may require a bond, or bonds, from the said receiver, and, if deemed

desirable for the protection of the assets, may require a bond, or bonds, of any special deputy receiver, or other assistant or employee appointed by or under the authority of this Article.

(e) Conducting of Business. Upon taking possession of the assets of a delinquent insurer the receiver shall, subject to the direction of the court, immediately proceed to conduct the business of the insurer, or to take such steps as may be necessary to conserve the assets and protect the rights of policyholders and claimants for the purpose of liquidating, rehabilitating, reinsuring, reorganizing or conserving the affairs of the insurer. Notwithstanding the foregoing requirements or the terms of any insurance contract issued by a delinquent insurer, the receiver is not required to defend any action against an insured of a delinquent insurer.

(f) Inventory. An inventory in duplicate of the insurer's assets shall be prepared forthwith by the receiver, one of which shall be filed in the office of the Board and one in the office of the clerk of the court having jurisdiction, which inventories shall be open to inspection.

(g) Disposal of Property; Settling Claims. The receiver may, subject to the approval of the court, (1) sell or otherwise dispose of the real and personal property, or any part thereof, of an insurer against whom a proceeding has been brought under this Article, and (2) sell or compound all doubtful or uncollectible debts, or claims owed by or owing to such insurer, including claims based upon an assessment levied against a member of a mutual insurer, reciprocal exchange, or an underwriter at Lloyds. Whenever the amount of any

such debt or claim owed by or owing to such insurer or the value of any item of property of the insurer does not exceed Ten Thousand Dollars ($10,000), exclusive of interest, the receiver may compromise or compound such debt or claim or sell such property upon such terms as the receiver may deem for the best interests of said insurer without obtaining the approval of the court. The receiver may, subject to the approval of the court, sell or agree to sell, or offer to sell, any assets of such an insurer to such of its creditors who may desire to participate in the purchase thereof, to be paid for, in all or in part, out of dividends payable to such creditors, and, upon the application of the receiver, the court may designate representatives to act for such creditors in the purchase, holding and/or management of such assets, and the receiver may, subject to the approval of the court, advance the expenses of such representatives against the security of the claims of such creditors. The receiver may, subject to the approval of the court and the commissioner, as required by this code, sell or otherwise dispose of the charter or license of the insurer separate and apart from its outstanding liabilities.

(h) Depositories. Except as provided by this subsection, all money collected by the receiver shall be forthwith deposited into the Texas Treasury Safekeeping Trust Company in accordance with procedures established by the comptroller. The receiver may deposit the money in any bank, banks, or savings and loan association or associations in this State insured by a federal agency that provides for deposit insurance if the receiver, in the exercise of sound financial judgment, determines that it would be advantageous to do so. The funds collected or realized from the assets of each

insurer for which the receiver has been appointed shall be accounted for by the receiver separately from all other funds. Whenever any account in a bank or savings and loan association exceeds the maximum amount insured by the appropriate federal agency, the receiver is hereby authorized and directed to make such contracts and require such security as it may deem proper for the safeguarding of such deposit without approval of the court.

(i) Venue. Exclusive venue of delinquency proceedings shall be in Travis County, Texas.

(j) Immunity. There is no liability on the part of, and a cause of action does not arise against, the receiver, a special deputy receiver, the commissioner, or an agent or employee of the receiver, a special deputy receiver, or the commissioner for a good faith action or failure to act in the performance of powers and duties under this article.

(k) Representation by Attorney General. The attorney general shall defend an action to which Subsection (j) of this section applies that is brought against the receiver, a special deputy receiver, the commissioner, or an agent or employee of the receiver, a special deputy receiver, or the commissioner. This subsection continues to apply to an action that is brought after the defendant's service with the receiver, a special deputy receiver, the commissioner, or the department has terminated or after the close of the receivership out of which the action arises. This subsection does not require the attorney general to defend any person with respect to an issue other than the applicability or effect of the judicial immunity codified by Subsection (j) of this section.

(l) Actions by Receiver. When performing the duties of receiver under this Article, the commissioner, a special deputy receiver, or an agent or employee of the commissioner, or a special deputy receiver shall be considered to be acting on behalf of the receivership estate, and the provisions of Chapter 105, Civil Practice and Remedies Code, shall not apply to any actions taken pursuant to this Article.

Claims

Sec. 3. (a) Time for Filing. Where a liquidation, rehabilitation, or conservation order has been entered in a proceeding against an insurer under this Article, all persons who may have claims against such insurer as set out in Subsection (a) of Section 8 of this Article, including claimants with secured claims and claims based on trust or escrow funds, shall present proof of the same to the receiver at a place specified by him within a period of time to be specified by the court, in no event, however, less than ninety (90) days after the date of the entry of the order specifying such time. The receiver shall notify all persons who may have claims against such insurer as disclosed by its books and records, to present proof of the same to him within the time as fixed. The last day for the filing of proofs of claim shall be specified in the notice. Such notice shall be given in a manner determined by the court. Receipt of the required proof of claim by the receiver is a condition precedent to the payment of any claim, and except as provided by Subsection (b) of this section, claims that are not filed within the time specified by the court shall not participate in any distribution of the assets by the receiver.

(b) Late Filing. Subject to court approval, the receiver may accept claims filed after the date specified by the court if the claims are filed with the receiver not later than the ninetieth (90th) day after the date notice of the claimant's right to file a proof of claim is mailed to the claimant.

(c) Proof Necessary. (1) A proof of claim shall consist of a written statement signed by the claimant that includes the following:

(A) the claim;

(B) the consideration for the claim; and whether any, and if so, what securities are held for the consideration for that claim;

(C) any right of priority of payment for the claim or other specific rights asserted by the claimant;

(D) whether any payments have been made on the claim, and if so, what payments have been made on the claim and from what sources;

(E) a statement that the sum claimed is justly owed by the insurer to the claimant; and

(F) any other matters that are required by the court in which the receivership is pending.

(2) A proof of claim shall be in a form designated by the receiver, except that the receiver may accept a proof of claim on a form:

(A) used for proof of claim by the insurer before the receivership; or

(B) prepared or accepted by a receiver or a guaranty fund in another state, if the receiver in this state is an ancillary receiver.

(3) A proof of claim shall be filed under oath, unless the oath is waived by the receiver.

(4) If a claim is founded upon an instrument in writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. After the instrument is filed, the receiver may in his discretion permit the claimant to substitute a true copy of the instrument, until the final disposition of the claim. If the instrument is lost or destroyed, a statement of that fact and of the circumstances of the loss or destruction shall be filed under oath with the claim.

(5) The receiver may accept a single proof of claim from each properly authorized insurance guaranty association combining all claims and related administrative expenses assigned to that association. A proof of claim submitted by a guaranty association must set forth any other information the receiver may require.

(d) Unliquidated or Undetermined Claims or Demands. Claims based on unliquidated or undetermined demands must be filed within the time limit provided in this Article for the filing of claims, but claims based on those demands shall not share in any distribution to claimants until those claims are definitely liquidated, determined, and

allowed. Thereafter, the claims shall share ratably with the claims of the same class in all subsequent distributions. An unliquidated or undetermined claim or demand under this Article is any claim or demand on which a right of action has accrued at the date of the commencement of the delinquency proceedings, or the insurance policy cancellation date if applicable, and on which the liability has not been determined or the amount of the claim or demand liquidated. If the receiver in all other respects is in a position to close the receivership proceedings, the proposed closing is sufficient grounds for the rejection of any remaining unliquidated or undetermined claim or demand. The receiver shall notify those claimants of his intention to close the proceedings and shall allow a 60-day period for liquidation and determination of those claims. If the remaining claims are not liquidated or determined within the 60-day period, the receiver may reject the claims and the provisions of Subsection (h) of this section apply.

(e) Third Party Claims. Where a liquidation, rehabilitation or conservation order has been entered in a proceeding against an insurer under this Article, any person who has a cause of action against an insured of such insurer under a liability insurance policy issued by such insurer, shall have the right to file a claim with the receiver, regardless of the fact that such claim may be unliquidated or undetermined, and such claim may be approved (1) if it may be reasonably inferred from the proof presented upon such claim that such person would be able to obtain a judgment upon such cause of action against such insured; and (2) if such persons shall furnish suitable proof that no further valid claims against such insurer arising out of his cause of action other than

those already presented can be made; and (3) if the total liability of such insurer to all claimants arising out of the same act of its insured shall be no greater than its total liability would be were it not in liquidation, rehabilitation or conservation. A judgment entered against an insured or insurer before the date on which the delinquency proceedings commenced may not be accorded higher than a Class 3 priority under Subsection (a) of Section 8 of this Article unless the judgment creditor proves to the receiver's satisfaction the allegations supporting the judgment. No judgment against an insured taken after the date of the commencement of the delinquency proceedings shall be considered in the proceedings as evidence of liability, or of the amount of damages, and no judgment against an insured taken by default or by collusion prior to the commencement of the delinquency proceedings shall be considered as conclusive evidence in the proceeding, either of the liability of such insured to such person upon such cause of action, or of the amount of damages to which such person is therein entitled.

(f) Offsets. In all cases of mutual debts or mutual credits, whether arising out of one or more contracts between the insurer and another person in connection with any claim or proceeding under this Article, such credits and debts shall be set off and the balance only shall be allowed or paid, except as provided in subsection (g).

(g) No Offsets. No offsets shall be allowed in favor of any person where (1) the obligation of the insurer to such person would not at the date of the commencement of the delinquency proceedings or as otherwise provided in Section

2(c), entitle him to share as a claimant in the assets of such insurer, or (2) the obligation of the insurer to such person was purchased by or transferred to such person subsequent to the commencement of the delinquency proceedings or for the purpose of increasing offset rights, or (3) the obligation of such person is to pay an assessment levied against the members of a mutual insurer, or reciprocal exchange, or underwriters at Lloyds, or to pay a balance upon a subscription to the capital stock of a stock insurance corporation, or (4) the obligation of such person is as a trustee or fiduciary, or (5) the obligations between the person and the insurer arise from reinsurance transactions in which either the person or the insurer has assumed risks and obligations from the other party and then has ceded back to that party substantially the same risks and obligations. The receiver shall provide persons with accounting statements identifying all debts that are due and payable. If a person owes the insurer amounts that are due and payable, against which the person asserts offset of mutual credits that may become due and payable from the insurer in the future, the person shall promptly pay to the receiver the amounts due and payable. Notwithstanding Section 8, or any other provision of this Article, the receiver shall promptly and fully refund, to the extent of the person's prior payments, any mutual credits that become due and payable to the person by the insurer.

(h) Action on Claims. The receiver shall have the discretion to approve or reject any claim filed against the insurer. Objections to any claim not rejected may be made by any party interested, by filing the objections with the receiver, who shall forthwith present them to the court for determination after notice and hearing. Upon the rejection

of each claim either in whole or in part, the receiver shall notify the claimant of such rejection by written notice. Action upon a claim so rejected must be brought in the court in which the delinquency proceeding is pending within three (3) months after service of notice; otherwise, the action of the receiver shall be final and not subject to review. Such action shall be de novo as if originally filed in said court and subject to the rules of procedure and appeal applicable to civil cases. This action shall be a separate action from the delinquency proceeding, and a claimant's attempt to appeal the action of the receiver by way of intervening in the delinquency proceeding does not comply with this subsection.

(i) Notwithstanding any other provision of this article, if a claim is covered by a guaranty fund created under Article 9.48, 21.28-C, or 21.28-D of this code, the receiver shall refer the claim to the appropriate guaranty association for processing.

Workers' compensation carrier: notification of Texas Workers' Compensation Commission

Sec. 3A. (a) The liquidator shall notify the Texas Workers' Compensation Commission immediately upon a finding of insolvency or impairment upon any insurance company which has in force any workers' compensation coverage in Texas.

(b) The Texas Workers' Compensation Commission shall, upon said notice, submit to the liquidator a list of active cases pending before the Texas Workers' Compensation Commission in which there has been an acceptance of

liability by the carrier, where it appears that no bona fide dispute exists and where payments were commenced prior to the finding of insolvency or impairment and where future or past indemnity or medical payments are due.

(c) Notwithstanding the provisions of Section 3 of this Article, the liquidator is authorized to commence or continue the payment of claims based upon the list submitted in Subsection (b) above.

(d) In order to avoid undue delay in the payment of covered workers' compensation claims, the liquidator shall contract with the Texas Workers' Compensation Pool or any other qualified organization for claims adjusting. Files and information delivered by the Texas Workers' Compensation Commission to the liquidator may be delivered to the Texas Workers' Compensation Pool or any organization with which the liquidator has contracted for claims adjusting services.

(e) The Texas Workers' Compensation Commission shall report to the State Board of Insurance any occasion when a workers' compensation insurer has committed acts that may indicate insurer financial impairment, delinquency or insolvency.

Actions

Sec. 4. (a) Injunctions. Upon an application by the receiver, the receivership court may, with or without notice, issue an injunction restraining the insurer named in the order, its officers, directors, stockholders, members, trustees, agents, servants, employees, policyholders, attorneys,

managers, attorneys-in-fact, associate, deputy, substitute attorneys-in-fact, and all other persons from the transaction of its business or the waste or disposition of its property, or requiring the delivery of its property and/or assets to the receiver subject to the further order of the court.

(b) Other Orders. Such court may at any time during a proceeding under this Article issue such other injunctions or orders as may be deemed necessary to prevent interference with the receiver or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments, garnishments, or other liens, or the making of any levy against the insurer or against its assets or any part thereof.

(c) No Preferences. Any claim, judgment, lien or preference against the insurer or its receiver obtained, after the date of receivership, in derogation of the terms of any such injunction or order of the receivership court may be denied by the receiver until proof of the justness of such claim, judgment, lien, preference or demand is made before and approved by the receivership court.

(d) Subpoenas. In addition to the authority granted by law to the receiver relating to the taking of depositions of witnesses in civil actions, the receiver may request the court ex parte to issue a subpoena to compel the attendance and testimony of witnesses before the receiver and the production of any books, accounts, records, papers, and correspondence or other records relating to any matter that pertains to a receivership estate, and for this purpose the receiver or his

designated representative may administer oaths and affirmations, examine witnesses, and receive evidence. In this connection the court has statewide subpoena power and may compel attendance and production of records before the receiver at his offices in Austin, Texas. Any person served with a subpoena under this subsection may file a motion with the court for a protective order as provided by Rule 166b of the Texas Rules of Civil Procedure. In a case of disobedience of a subpoena, or of the contumacy of a witness appearing before the receiver or his designated representative, the receiver may invoke the aid of the court, and the court may issue an order requiring the person subpoenaed to obey the subpoena or give evidence or produce books, accounts, records, papers, and correspondence or other records respecting the matter in question. Any failure to obey such an order of the court may be punished as contempt by the court.

Each witness who is not a party and who is required to attend before the receiver is entitled to receive:

(1) reimbursement for travel in the same amount per mile as the mileage travel allowance for state employees for going to and returning from the place where his presence is required, if the place is more than 25 miles from the witness's place of residence; and

(2) a fee of not less than Ten Dollars ($10) a day for each day or part of a day the witness is necessarily present as a witness, but in lieu of such Ten Dollar ($10) fee, a witness will receive a fee equal to the per diem travel allowance of a state employee if the amount exceeds Ten

Dollars ($10). All disbursements made in the payment of these fees shall be included and paid in the same manner as provided for the payment of other expenses in Section 12 of this Article.

The sheriff's or constable's fee for serving the subpoena shall be the same as those paid the sheriff or constable for similar services. Any subpoena issued under this subsection may be served, at the receiver's discretion, by the receiver, his authorized agent, a sheriff, or a constable.

On certification by the receiver or the State Board of Insurance under official seal, any books, accounts, records, papers, correspondence, and other records and documents produced or testimony taken pursuant to this Article and held by the receiver are admissible in evidence in all cases without prior proof of their correctness and without other proof except the certificate of the receiver or the State Board of Insurance that the books, accounts, records, papers, correspondence, documents, and testimony were received from the person producing the material or testifying. The certified books, accounts, records, papers, correspondence, and other records and documents or certified copies of them are prima facie evidence of the facts they disclose. This section may not be construed to limit any other provision of this Article or any law that provides for the admission of evidence or for its evidentiary value.

(e) Records with Third Parties. All officers, directors, stockholders, members, trustees, managing general agents, agents, administrators, claims adjusters, managers, attorneys-in-fact, or associate, deputy, or substitute attorneys-in-fact

of the delinquent insurer shall immediately deliver to the possession of the receiver all properties, books, records, accounts, documents, and other writings of the delinquent insurer or that relate to the business of the delinquent insurer without cost to the receiver; however, if by contract or otherwise any of the properties, books, records, accounts, documents, and other writings belong to or are the property of those persons, they shall be copied, the copy delivered to the receiver, and the original retained by the owner until notification that it is no longer required in the administration of the insurer's estate or at any other time as the court, after notice and hearing, shall direct. The copies are deemed to be records of the delinquent insurer under Section 11 of this Article.

(f) Pending Lawsuits. No judgment or order rendered by any court of this State or of any other jurisdiction in any action pending by or against the delinquent insurer after the commencement of delinquency proceedings shall be binding upon the receiver unless the receiver shall have been made a party to such suit.

A receiver and his agents and employees are not liable for and a cause of action may not be brought against any of them for an action taken or not taken by them relating to the adjustment, negotiation, or settlement of claims.

(g) One Year Extension. The receiver shall not be required to plead to any suit in which he may be a proper party plaintiff or defendant, in any of the courts in this State until one (1) year after the date of his appointment as receiver, and the provisions of Sections 64.033, 64.052, 64.053, and

64.076, Civil Practice and Remedies Code, as amended, shall not apply to insolvent insurance companies being administered under this Article.

(h) New Lawsuits. The court of competent jurisdiction of the county in which the delinquency proceedings are pending under this Article shall have exclusive venue to hear and determine all actions or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver.

(i) Repealed by Acts 1993, 73rd Leg., ch. 790, § 46(18), eff. Sept. 1, 1993.

All criminal history information records obtained by the receiver are privileged information and are for the exclusive use of the receiver. Except on court order or with the consent of the person being investigated, the records may not be released to any other person or agency. The receiver may destroy the criminal history information records after the records are used for the purposes authorized by this subsection. A person commits an offense if the person releases or discloses any information received under this subsection without the authorization provided by this subsection. An offense under this subsection is a Class A misdemeanor.

Voidable transfers

Sec. 5. (a) Transfers or Liens Voidable. Any transfer or lien upon the property or assets of an insurer which is made or created within four (4) months prior to the

commencement of delinquency proceedings under this Article, with the intent of giving to any creditor or enabling him to obtain a greater percentage of his debt than of any other creditor of the same class, and which is accepted by such creditor, having reasonable cause to believe that such preference will occur, shall be voidable.

(b) Personal Liability. Every director, officer, agent, employee, stockholder, member, attorney-in-fact, associate, substitute or deputy attorney-in-fact, underwriter, subscriber, and any other person acting on behalf of such insurer, who shall be concerned in any such prohibited act or deed, and every person receiving thereby property of such insurer, or the benefit thereof, shall be personally liable therefor, and shall be bound to account to the receiver for the benefit of the creditors of the insurer.

(c) Avoiding and Recovery. The receiver in any proceeding under this Article, may avoid any transfer of, or lien upon the property or assets of an insurer which any creditor, stockholder or member of such insurer might have avoided, and may recover the property so transferred or its value from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the commencement of proceedings under this Article. Such property or its value may be recovered from anyone who has received it, except a bona fide holder for value as above specified.

Employees

Sec. 6. The receiver shall pay wages actually owed to employees of an insurer against whom a temporary

restraining order has been issued under this Article for services rendered during the period covered by the temporary restraining order as a Class 1 claim as provided by Section 8(a) of this Article. Payment for those services must be made at the rate and in the same manner as if paid by the insurer. The receiver may pay wages actually owed to employees of an insurer against whom a temporary injunction has been issued under this Article for services rendered after the issuance of the temporary injunction. Payment for those services is made at the discretion of the receiver and as an expense of administration.

Assessments

Sec. 7. (a) Application. Within four (4) years from the date of an order of rehabilitation, or liquidation, of a domestic insurer, the receiver may make an application to the court to levy an assessment against the members of a mutual insurer, members of a reciprocal exchange, or the insureds of a Lloyds who have been issued an insurance policy that provides that the policy is subject to assessment. Such application shall set forth the reasonable value of the assets of such insurer, its probable liabilities, and the probable necessary assessment, if any, to pay all possible claims and expenses in full, including expenses of administration and collection.

(b) Levy. After notice to each member or insured in the manner designated by the court, the court shall proceed to consider such report and may levy one or more assessments. Such assessment or assessments shall cover the excess of the probable liabilities over the reasonable value of the assets, together with the estimated cost of collection

and percentage of uncollectibility thereof. An assessment shall not be levied against any such member or insured with respect to a policy that does not contain an express provision that the policy is an assessable policy.

(c) Collection. After the entry of such an order of assessment and the expiration of the time for appeal, the receiver shall proceed to collect such assessments, and for the purpose of such collection may bring suit for the same in any court of competent jurisdiction in the county in which such delinquency proceeding is pending.

(d) Provisions Cumulative. The provisions of this Section are cumulative of any other remedies for the levy and collection of assessments.

Early access distribution

Sec. 7A. (a) Within 120 days of the commencement of the insolvency proceeding against an impaired insurer, the liquidator or a special deputy receiver appointed under this Article may make application to the court for approval of a proposal to disburse assets out of marshaled assets, from time to time as such assets become available, to a guaranty association or foreign guaranty association having Class 1 or Class 2 claims against the estate of the impaired insurer because of such insolvency. If the receiver or special deputy receiver fails to make such application within 120 days, the guaranty association may submit an application to the court requesting that the receiver or special deputy receiver submit a proposal to disburse assets. If the liquidator or special deputy receiver determines that there are insufficient assets

to disburse, the application required by this section shall be considered satisfied by a filing by the liquidator or special deputy receiver stating the reasons for this determination.

(b) Such proposal shall, at a minimum, include provisions for:

(1) reserving amounts sufficient to allow the payment of Class 1 claims, and to the extent the assets of the insolvent insurer will allow any payment to be made on Class 2 claims, reserving amounts sufficient to provide equal pro-rata distributions to the Class 2 claimants other than the guaranty associations;

(2) disbursement of the assets marshaled to date and the subsequent distribution of assets as they become available;

(3) equitable allocation of disbursements to each of the guaranty associations and foreign guaranty associations entitled thereto;

(4) the securing of the liquidator or special deputy receiver from each of the associations entitled to disbursements pursuant to this section of an agreement to return to the liquidator upon request and approval by the court such assets, together with income on assets previously disbursed, as may be required to pay Class 1 claimants and any federal claimants asserting priority claims. No bond shall be required of any such association; and

(5) a full report to be made by each association to the liquidator or special deputy receiver, as requested by the

liquidator or special deputy receiver, but no more frequently than quarterly, accounting for the assets so disbursed to the association, all disbursements made therefrom, any interest earned by the association on such assets and any other matter as the court may direct.

(c) The proposal submitted by the liquidator or special deputy receiver shall provide for disbursements to the associations in amounts estimated at least equal to the claim payments made or to be made thereby for which such associations could assert a claim against the liquidator, and shall further provide that if the assets available for disbursement from time to time do not equal or exceed the amount of such claim payments made or to be made by the association, then disbursements shall be made for the pro-rata amount of the association's Class 2 claim.

(d) The proposal submitted by the liquidator or special deputy receiver shall, with respect to an insolvent insurer writing life or health insurance or annuities, provide for disbursement of assets to any guaranty association or foreign guaranty association covering life or health insurance or annuities or to any other entity or organization reinsuring, assuming, or guaranteeing policies or contracts of insurance under the acts creating such associations.

(e) Notice of the application shall be given to the association in and to the commissioners of insurance in each of the states. Notice shall be considered to have been given when deposited in the United States certified mail, first class postage prepaid, at least 30 days prior to the submission of the application to the court. Action of the application may

be taken by the court if notice has been given and if the liquidator's or special deputy receiver's proposal complies with the requirements of this section. Notice of the application shall be given to those Class 1 and Class 2 claimants that are reasonably ascertainable in a manner deemed appropriate by the court, including notice by publication.

Distribution of assets

Sec. 8. (a) Priority of Distribution of Assets. (1) In order to provide for the orderly liquidation of a receivership estate and to further the protection of policyholders and those making claims under insurance policies, the following priorities are established. The priority of distribution of assets from the insurer's estate shall be in accordance with the disbursement plan approved by the court under Section 7A of this Article, and in accordance with the order of each class as provided by this subsection. Every claim in each class shall be paid in full or adequate funds retained for such payment before the members of the next class receive any payment. No subclasses shall be established within any class.

(2) Classes of claims:

(A) Class 1:

(i) All of the receiver's, conservator's, and supervisor's costs and expenses of administration, including repayment of funds advanced to the receiver from the abandoned property fund of the department.

(ii) All of an insurance guaranty association's or foreign insurance guaranty association's costs and expenses of

administration related to a receivership estate and all of the expenses of an insurance guaranty association or foreign insurance guaranty association in handling claims. For the purpose of this subparagraph, attorney's fees incurred by an insurance guaranty association or foreign insurance guaranty association in the defense of an insured under a policy issued by an impaired insurer constitute an expense incurred in handling claims.

(iii) Secured creditors to the extent of the value of the security as provided by Section 8(c) of this Article.

(B) Class 2:

(i) All claims by policyholders, beneficiaries, insureds, and liability claims against insureds covered under insurance policies and insurance contracts issued by the insurer.

(ii) All claims by an insurance guaranty association or a foreign insurance guaranty association that are payments of proper policyholder claims.

(C) Class 3: Claims of the federal government not included in Class 2, above.

(D) Class 4: All other claims of general creditors not falling within any other priority under this section including claims for taxes and debts due any state or local government which are not secured claims.

(E) Class 5: Claims of surplus or contribution note holders, holders of debentures or holders of similar

obligations and proprietary claims of shareholders, members, or other owners according to the terms of the instruments.

(3) If any provision of this subsection or the application of any provision of this subsection to any person or circumstance is held invalid, that invalidity does not affect the other provisions or applications of this subsection.

(b) Dividend Payments. On the direction and approval of the court and pursuant to the priorities provided by this section, the receiver may make periodic dividend payments, including payments of policyholder claims, for the purpose of facilitating the rehabilitation, liquidation, conservation, or dissolution of an insurer. The receiver at all times shall reserve sufficient assets for the payment of the expenses of administration.

(c) Secured Creditor.

(1) The owner of a secured claim against an insurer for which a receiver has been appointed in this or any other state may surrender his security and file his claim as a general creditor, or the claim may be discharged by resort to the security, in which case the deficiency, if any, shall be treated as a claim against the general assets of the insurer on the same basis as claims of unsecured creditors. If the amount of the deficiency has been adjudicated in ancillary proceedings as provided in this chapter, or if it has been adjudicated by a court of competent jurisdiction in a proceeding in which the domiciliary receiver has had notice and an opportunity to be heard, such amount shall be conclusive; otherwise the amount shall be determined in the delinquency proceeding in the domiciliary state.

(2) The value of any security held by a secured creditor shall be determined under supervision of the court by:

(A) converting the security into money according to the terms of the agreement pursuant to which the security was delivered to the creditor; or

(B) by agreement, arbitration, compromise, or litigation between the creditor and the receiver.

(d) Interest. Interest shall not accrue on any claim subsequent to the date of the commencement of delinquency proceedings.

(e) Foreign Claimants. If any claimant of another state or foreign country shall be entitled to or shall receive a dividend upon his claim out of a statutory deposit or the proceeds of any bond or other asset located in such other state or foreign country, then such claimants shall not be entitled to any further dividend from the receiver until and unless all other claimants of the same class, irrespective of residence or place of the acts or contracts upon which their claims are based, shall have received an equal dividend upon their claims; and after such equalization, such claimants shall be entitled to share in the distribution of further dividends by the receiver, along with and like all other creditors of the same class, wheresoever residing.

(f) Setoff by Receiver. Upon the declaration of a dividend, the receiver shall apply the amount of such dividend against any indebtedness owed to the insurer by the person entitled to such dividend.

(g) Unclaimed Funds. Unclaimed dividends on approved claims, unclaimed returned assessments, and all other unclaimed funds subject to distribution to claimants, policyholders or other persons, remaining in the receiver's hands after payment of the final dividend shall be delivered to the Board at the time the receivership is closed, or in the event a final dividend is paid less than ninety (90) days prior to the closing of the receivership, the receiver may continue the bank account or accounts of such receivership from which such funds might be paid, for a period of time not to exceed ninety (90) days from the date of the closing of said receivership, before the same are so delivered to the Board. Such funds shall be deposited by the Board in trust in a special account to be maintained with the comptroller.

(h) Recovery by Owner. On receipt of satisfactory written and verified proof of ownership within two (2) years from the date such funds are deposited with the comptroller, the Board shall certify such facts to the Comptroller, who shall issue proper warrant therefor in favor of the parties respectively entitled thereto, drawn on the State Treasury.

(i) Declaration of Abandonment. After such funds have remained unclaimed for two (2) years, the Liquidator may initiate action to have them declared to be abandoned, and the property of the State Board of Insurance. Such action shall be commenced by the filing by the Liquidator, in the court of competent jurisdiction in the county in which the delinquency proceeding is, or was pending, of a notice of his intention to declare such funds to be abandoned, and that he is claiming the same as the property of the State Board of Insurance. Such action may be for all or any part of such

funds accumulated in any one particular receivership. Such notice shall state the name or names of the person or persons entitled thereto, his or their last known address, and the nature or source and amount of the fund or funds. Upon the filing of such notice by the Liquidator, the court shall set a date for the hearing of the application, and shall make notation thereon of the date of such hearing, which date shall be at least twenty (20) days subsequent to the date of the filing of said notice. A copy of said notice, with the judge's notation thereon shall be posted on the courthouse door of said court for at least twenty (20) days before a hearing is had thereon. Notice of the filing of the application shall be published at least once, and at least ten (10) days prior to the date set for such hearing, in a newspaper of general circulation in the county where the application is pending. Such notice shall be addressed to the true owners of unclaimed funds in the particular receivership involved in the application and shall state generally that a hearing shall be had on the date specified for the purpose of declaring such funds to be abandoned and the property of the State Board of Insurance. Upon the hearing on such application of the Liquidator, proof to the satisfaction of the court:

(1) That such funds, or the checks therefor, had previously been sent by the Receiver to the last known address of the person or persons entitled thereto;

(2) That such funds, or the checks therefor, had been returned unclaimed or that the check or checks therefor had not been cashed;

(3) That the funds had been delivered to the Board as required by Subsection (g) above;

(4) That such money remained unclaimed with the Board for two (2) years; and

(5) That notice of filing of the application has been published as herein provided, shall be prima facie evidence of the intention of the person or persons entitled thereto to abandon the same, and that the Board is the rightful owner thereof. Upon such finding by the court, the court shall be authorized to render judgment accordingly. Upon receipt of such judgment, the Board shall certify such fact to the Comptroller of Public Accounts, who shall issue proper warrant therefore to the State Board of Insurance. The Board shall forthwith deposit such funds in accordance with the provisions of Section 2(h) of this Article, except that such funds derived through any one insurer need not be kept separate from such funds derived through any other insurer.

(j) Use of Abandoned Funds. Such funds so deposited by the Board in accordance with Subsection (i) above may be expended by the Liquidator, with the consent of the Board, for the purpose of paying expenses of the office of the Liquidator and/or Receiver that are not properly chargeable to any one receivership or conservatorship estate, and for the purpose of financing continued operation of any receivership or conservatorship then being administered by the Liquidator as Receiver or Conservator, when in the discretion of the Board it appears to be in the best interest of such receivership or conservatorship estate that it not be closed, and that additional administration be had thereon. Any funds so applied from this source to another receivership or conservatorship estate are to be repaid from the assets of the receivership or conservatorship estate to which they were

applied before additional dividends, including policyholder and other claims, are paid in any such receivership, or before the conservatorship is released for continued operation.

(k) Every claim under a separate account established under Article 3.75 of this code, providing that the income, gains, and losses, realized and unrealized, from assets allocated to the separate account shall be credited to or charged against the account, without regard to other income, gains, or losses of the life insurance company, shall be satisfied out of the assets in the separate account equal to the reserves maintained in such account for the contracts. To the extent provided under contracts established under Article 3.75 of this code, that portion of the assets of any separate account equal to the reserves and other contract liabilities for the separate account is not chargeable with liabilities arising out of any other business of the company. To the extent, if any, reserves maintained in the separate account are in excess of the amounts needed to satisfy claims under the separate account contracts, the excess shall be treated as general assets of the life insurance company.

Settlement of claims; abandoned funds; re-opening of receiverships

Sec. 8A. Any and all assets other than cash remaining in the receiver's hands after payment of the final dividend may be conveyed, transferred or assigned to the commissioner to be handled as a trust. The commissioner shall have authority to convey, transfer, and assign any assets, including causes of action, judgments, and claims, and to settle or release causes of action, judgments, claims, and liens

on such terms and for such amounts as he deems for the best interest of such trust, whether such assets have heretofore or may hereafter come into his hands. From proceeds derived from any such assets the commissioner or the special deputy receiver shall defray the costs incident to the sale, settlement, release or other transaction whereby such proceeds are obtained, and deliver the remainder to the Board to be deposited by it in trust in a special account to be maintained with the comptroller to be handled, disposed of and used as follows:

An order directing disposition of such funds may be made by a court of competent jurisdiction of Travis County, Texas, upon application of the commissioner, after notice and hearing. Notice shall be posted on the courthouse door of said court for at least twenty (20) days before a hearing is had on the commissioner's application, and notice shall be published at least once, and at least ten (10) days prior to the date set for such hearing, in a newspaper of general circulation in Travis County. Such notice shall state the amount of the funds and the receivership from which they were derived. It shall be addressed to all persons having an interest, as claimant or otherwise, in the assets of the particular receivership involved in the application, and shall state generally that a hearing shall be had on the date specified for the purpose of determining the disposition to be made of such funds, including a declaration that such funds are abandoned and the property of the State Board of Insurance.

If the court finds that funds derived from any receivership are sufficient to justify reopening of the

receivership and payment of a dividend, then such may be ordered, but otherwise, if such funds are insufficient for that purpose, the court may declare such funds abandoned and a certified copy of such judgment will be authority for the comptroller to issue a Warrant therefor to the State Board of Insurance. The Board shall forthwith deposit such funds in accordance with the provisions of Section 2(h) of this Article, except that funds derived from one insurer need not be kept separate from funds derived through any other insurer.

Such funds may be used as provided in Section 8(j) of this Article.

Closing

Sec. 9. (a) Excess Assets — Stock Companies. When the receiver shall have made provision for unclaimed dividends and all of the liabilities of a stock insurance company, he shall call a meeting of the stockholders of the insurer by giving notice thereof in one (1) or more newspapers in the county where the principal office of the insurer was located, and by written notice to the stockholders of record at their last known address. At such meeting, the stockholders shall appoint an agent or agents to take over the affairs to continue the liquidation for benefit of the stockholder. Voting privileges shall be governed by the insurer's bylaws. A majority of the stock shall be represented at the agent's appointment. Such agent or agents shall execute and file with the court such bond or bonds as shall be approved by it, conditioned on the faithful performance of all the duties of the trust. Under order of the court the receiver shall then transfer and deliver to such agent or agents

for continued liquidation under the court's supervision all assets of insurer remaining in his hands, whereupon the receiver and the Board, and each member and employee thereof, shall be discharged from any further liability to such insurer and its creditors and stockholders; provided, however, that nothing herein contained shall be so construed as to permit the insurer to continue in business as such, but the charter of such insurer and all permits and licenses issued thereunder or in connection therewith shall be ipso facto revoked and annulled by such order of the court directing the receiver to transfer and deliver the remaining assets of such insurer to such agent or agents.

(b) Excess Assets — Other Companies. After the receiver shall have made provision for unclaimed dividends and all of the liabilities of any insurer other than a stock insurance company, he shall dispose of any remaining assets as directed by the receivership court.

(c) Excess Assets — Guaranty Associations. Notwithstanding any other provisions of this article in closing an estate, a special deputy receiver, on approval of the court, may transfer any remaining assets, causes of action asserted on behalf of the impaired insurer, judgment, claims, or liens to the appropriate guaranty association and this transfer shall not be a preference or voidable transfer but shall be considered a distribution under Section 8(a)(1) of this article. In the event the sum realized by the guaranty association is materially larger than the amount loaned to the estate by the guaranty association, the court may order reopening of the estate to disburse the excess funds. Nothing in this section shall be construed as a transfer of any liability of an impaired

insurer to the guaranty association that would not constitute a claim payable under Articles 9.48, 21.28-C, or 21.28-D of this code.

(d) Limitation. Except as otherwise provided by this subsection, each receivership or other delinquency proceeding prescribed by this Article shall be administered in accordance with Section 64.072, Civil Practice and Remedies Code. To the extent a receivership or delinquency proceeding initiated against an insurer applies to claims against a workers' compensation insurance policy or a title insurance policy, the receivership or delinquency proceeding shall be administered continuously for whatever length of time is necessary to effectuate its purposes, and no arbitrary period prescribed elsewhere by the laws of Texas limiting the time for the administration of receiverships or of corporate affairs generally shall be applicable thereto. Instead of the winding up and distribution of a receivership estate of an insurer without capital stock, the court shall order revival and reinstatement of the charter, permits, licenses, franchises, and management contracts or other control instruments of the insurer if the insurer's remaining cash on hand and on deposit, less any outstanding valid and enforceable liabilities, exceeds the minimum amount of capital and surplus prescribed for that insurer under Article 2.02 or Section 1 of Article 3.02 of this code.

(e) Reopening. If after the receivership shall have been closed by final order of the court, the liquidator shall discover assets not known to him during receivership, he shall report his findings to the court. It shall be within the discretion of the court as to whether the value of the after-discovered assets

shall justify the reopening of the receivership for continued liquidation.

Reinsurance

Sec. 10. (a) Reinsurer's Liability. If the receiver has claims under policies covered by reinsurance, there shall be no diminution of the liability of the reinsurer to the receiver under the contracts reinsured because of the delinquency proceeding against the delinquent company, regardless of any provisions in the reinsurance contract to the contrary, except: (i) where the contract or other written agreement entered into prior to the delinquency proceeding and otherwise permitted by law specifically provides another payee of such reinsurance in the event of the insolvency of the ceding insurer; or (ii) where the assuming insurer, with the consent of the direct insured, has assumed such policy obligations of the ceding insurer pursuant to an assumption reinsurance agreement as direct obligations of the assuming insurer to the payees under policies and in substitution for the obligations of the ceding insurer to such payees. With the sole exception of (i) or (ii) above, any reinsurance shall be payable to the receiver under a contract reinsured by the assuming insurer on the basis of approved claims under Section 3(h) of this Article and claims paid under Articles 9.48, 21.28-C, and 21.28-D of this code or the guaranty associations of other states.

(b) Notice to Reinsurer. The liquidator or receiver shall give written notice to the affected reinsurers of the pendency of a claim against the receiver under a policy covered by reinsurance within a reasonable time after such claim is filed

in the delinquency proceeding. During the pendency of such claim any affected reinsurer may investigate such claim and interpose, at its own expense, in the proceeding where the claim is to be adjusted any defense or defense which it may deem available to the delinquent company, the liquidator or the receiver. Subject to court approval, the expense thus incurred shall be chargeable against the delinquent company as part of the expense of liquidation to the extent of a proportionate share of the benefit which may accrue to the delinquent company solely as a result of the defense undertaken by the assuming insurer. Where two or more assuming insurers are involved in the same claim and a majority in interest elect to interpose a defense to such claim, the expense shall be apportioned in accordance with the terms of the reinsurance agreement as though such expense had been incurred by the ceding insurer.

(c) Provided, however, that Article 6.16 of the Insurance Code of 1951, Acts Regular Session of the Fifty-second Legislature, 1951, Chapter 491, page 868, shall remain in full force and effect and shall govern as to those insurance companies affected thereby.

Evidence in records

Sec. 11. (a) Records Admitted. All books, records, documents and papers of any delinquent insurer received by the receiver and held in the course of the delinquency proceedings, or certified copies thereof, under the hand and official seal of the Board and/or receiver, shall be received in evidence in all cases without proof of the correctness of the same and without other proof, except the certificate of

the Board and/or receiver that the same was received from the custody of the delinquent insurer or found among its effects.

(b) Certificates. The receiver shall have the authority to certify to the correctness of any paper, document or record of the receiver's office, including those described in (a) of this section, and to make certificates under seal of the Board and certified by the receiver certifying to any fact contained in the papers, documents or records of the Texas Department of Insurance; and the same shall be received in evidence in all cases in which the originals would be evidence.

(c) Prima-facie Evidence. Such original books, records, documents and papers, or certified copies thereof, or any part thereof, when received in evidence shall be prima-facie evidence of the facts disclosed thereby.

(d) Maintenance of Records. The receiver may devise a method for the effective, efficient, and economical maintenance of the records of the delinquent insurer and of the liquidator's office including maintaining those records on any medium approved by the Records Management Division of the Texas State Library. A copy of an original record or any other record that is maintained on any medium approved by the Records Management Division of the Texas State Library within the scope of this section that is produced by the receiver or his authorized representative under this Article shall have the same force and effect as the original record and may be used the same as the original record in any judicial or administrative proceeding in this state. In order to maintain the records of delinquent insurers after the

closing of the receivership proceedings, the receiver may reserve assets of an estate to be deposited in an account to be used for the specific purpose of maintenance, storage, and disposal of records in closed receivership estates.

(e) Disposition of Records. On approval by the court, the receiver may dispose of any records of the delinquent insurer that are obsolete and unnecessary to the continued administration of the receivership proceedings.

(f) Open records. Chapter 552, Government Code, shall not apply to any records of a receivership estate, or to the records of an insurance company prior to its receivership, held by the receiver or by a special deputy receiver under this Article.

Liquidator, assistants, expense accounts

Sec 12. (a) Special Deputy Receiver, Bond. A special deputy receiver appointed by the commissioner under this article shall file with the commissioner a bond in an amount established by the commissioner, payable to the commissioner for the benefit of injured parties, and conditioned on the faithful performance of the special deputy receiver's duties and the proper accounting for all moneys and properties received or administered by the special deputy receiver.

(b) Appointments, Expenses. The commissioner may appoint, set the compensation of, and contract with one or more qualified special deputy receivers to act for the commissioner under this code. In making an appointment

under this section, the commissioner shall attempt to reflect the ethnic, racial, and geographic diversity of the state. A special deputy receiver has all the powers of the receiver granted by this code, unless limited by the commissioner. The payment of such compensation and all expenses of liquidation shall be made by the commissioner or special deputy receiver out of funds or assets of the insurer. An itemized report of such expenses, sworn to by the commissioner or a special deputy receiver, shall be presented on a monthly basis to the court, which account shall be approved by the court unless objection is filed thereto within ten (10) days after the presentation of the account. The objection, if any, must be made by a party at interest and shall specify the item or items objected to and the ground of such objection. The court shall set the objection down for hearing, notifying the parties of the setting. The burden of proof shall be upon the party objecting to show that the items objected to are improper, unnecessary or excessive.

(c) Filing Reports. The receiver shall file reports with the Board upon its request showing the operation, receipts, expenditures, and general condition of any organization of which the receiver may have charge at that time, and, upon request, shall file a copy of said report with the court in which said receivership proceeding is pending. The receiver shall also file a final report of each organization which has been liquidated or handled showing all receipts and expenditures, and giving a full explanation of the same and a true statement of the disposition of all of the assets of each organization.

(d) Audit. The state auditor may conduct an audit of the liquidator in accordance with the audit plan reviewed

and approved by the legislative audit committee. The audits authorized by this subsection shall be conducted in the manner provided by Chapter 321, Government Code.

(e) Contents of Auditor's Report. The state auditor's report of the audit authorized by Subsection (d) of this section may include:

(1) an analysis of the overall performance of the liquidator;

(2) an analysis of the liquidator's financial operations and condition;

(3) an analysis of receipts and expenditures made in connection with each audited receivership and an analysis of the adequacy of the receiver's bond in relation to assets, receipts, and expenditures;

(4) the amount of funds made available to the liquidator by a guaranty association in connection with each audited receivership and a detail of the purpose and manner of expenditure of such funds;

(5) the ratio of the total amount of claims paid to the total costs incurred in connection with each audited receivership;

(6) the ratio of the liquidator's administrative expenses to the total costs incurred in connection with each audited receivership; or

(7) an analysis of the feasibility of using attorneys who are employees of the liquidator in all litigation.

(f) Filing of Auditor's Reports. Copies of the auditor's report shall be filed in the manner required by Section 321.014, Government Code. An additional copy of the report shall be filed with the board and the commissioner.

(g) Court-Ordered Audit. A court in which a receivership action is pending may order an audit of the books and records of the liquidator as they relate to the receivership. A report of an audit ordered under this subsection shall be filed with the board, the commissioner, and the appropriate guaranty association. The liquidator shall make the books and records relating to the receivership available to the auditor as required in the court order. The liquidator shall pay the expenses of an audit ordered under this subsection.

(h) Authority of Special Deputy Receiver. A special deputy receiver appointed by the commissioner serves at the pleasure of the commissioner. Unless restricted by the commissioner, a special deputy receiver may perform any act on behalf of the commissioner. If expressly authorized by the commissioner, a special deputy receiver may employ employees and agents, legal counsel, actuaries, accountants, appraisers, consultants, and other personnel as the special deputy receiver considers necessary to assist in the performance of the receiver's duties. The expenses of employing those persons are expenses of the receivership payable out of funds or assets of the insurer.

(i) Reports of Fraudulent Activities. The special deputy receiver shall report to the insurance fraud unit any information relating to possible fraudulent, deceptive, or unlawful conduct by an insurer discovered in administration of the receivership.

(j) The Board shall adopt rules prescribing the audit coverage required for the receiver, each special deputy receiver appointed under this section, and each guaranty association established under Article 9.48, 21.28-C, or 21.28-D of this code. Such rules shall include, but not be limited to, provisions relating to the scope, frequency, reporting requirements, and cost of audits, and shall be submitted to the state auditor for review and comment prior to adoption.

(k) The state auditor is authorized to conduct audits, as defined by Sections 321.0131 through 321.0136, Government Code, of the receiver, each special deputy receiver appointed under this section, and each guaranty association established under Article 9.48, 21.28-C, or 21.28-D of this code, as the commissioner or the state auditor determines to be necessary to supplement audits conducted under Subsection (j) of this section. Costs associated with any such audit shall be reimbursed to the state auditor by the audited entity.

Legislative appropriations

Sec. 12A. (a) Expired January 1, 1994.

(a-1) The provisions of this Act are cumulative of existing law and in the event of conflict the provisions of this Act shall govern.

(b) The Liquidator and the employees working for the Liquidator or in the liquidation division of the State Board of Insurance are employees of the State Board of Insurance for the purpose of:

(1) reporting payroll information to the uniform statewide accounting system; and

(2) submitting vouchers to the comptroller for the payment of the salaries of the Liquidator and the employees.

Ancillary delinquency proceedings

Sec. 13. A court of competent jurisdiction in this State shall, on the petition of the State Board of Insurance, appoint the liquidator herein provided as ancillary receiver in this State of an insurer domiciliary in another state or jurisdiction when under the laws of this State a receiver should be appointed. The Board shall file such a petition on its own initiative or if ten (10) or more persons resident in this State, having claims against such insurer, file a petition or petitions in writing with the Board, requesting the appointment of such ancillary receiver. Such ancillary receiver shall have the right to sue for and reduce to possession the assets of such insurer in this State, and shall have the same powers and be subject to the same duties with respect to such assets, as are possessed by a receiver of a domiciliary insurer under the laws of this State. On commencement of the delinquency proceedings in this State, the ancillary receiver in this State immediately is entitled to possession and control of any special or statutory deposits of the delinquent insurer located within this State. The ancillary receiver may use those special

or statutory deposits first towards the payment of expenses of the administration of the receivership proceedings then towards the payment of approved claims against the deposits. The remaining provisions of this Article shall be applicable to the conduct of such ancillary proceedings.

Contracts with foreign receiver

Sec. 14. In cases where a receiver of any delinquent insurer has been appointed both in Texas and in some other state, the Texas receiver, either domiciliary or ancillary, may, under supervision of the Texas receivership court, contract with the receiver in such other state for the administration of the affairs of their respective receiverships in any manner consistent with this Article which will enable the respective receivers to coordinate their activities in the interest of efficiency and economy.

Borrowing on the pledge of assets

Sec. 15. For the purpose of facilitating the rehabilitation, liquidation, conservation or dissolution of an insurer pursuant to this Article the receiver may, subject to the approval of the court, borrow money and execute, acknowledge and deliver notes or other evidences of indebtedness therefor and secure the repayment of the same by the mortgage, pledge, assignment, transfer in trust, or hypothecation of any or all of the property whether real, personal or mixed of such insurer, and the receiver, subject to the approval of the court, shall have power to take any and all other action necessary and proper to consummate any such loans and to provide for the repayment thereof. The receiver shall be under no

obligation personally or in his official capacity as receiver to repay any loan made pursuant to this section.

Conflicts of law

Sec. 16. In the event of conflict between the provisions of this Article and the provisions of any existing law, the provisions of this Article shall prevail, and all laws, or parts of law, in conflict with the provisions of this Article, are hereby repealed to the extent of such conflict.

* * * *

Supreme Court, U.S.
FILED
SEP 28 1999
CLERK

No. 99-309

In The

Supreme Court of the United States

JACK M. WEBB, Special Deputy Receiver for Employers National Insurance Company in Receivership,

Petitioner,

v.

B.C. ROGERS POULTRY, INC. and B.C. ROGERS PROCESSORS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties.

CORPORATE DISCLOSURE STATEMENT

No parent or publicly held company owns 10% or more of the stock in B.C. Rogers Poultry, Inc. or B.C. Rogers Processors, Inc.

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BRIEF IN OPPOSITION

I. Preliminary Statement

In *Webb v. B.C. Rogers Poultry, Inc.*, 174 F.3d 697 (5th Cir. 1999), the Fifth Circuit Court of Appeals held that *Burford* abstention could not be used to remand a damages only action. *Webb* is consistent with this Court's holding in *Quackenbush v. Allstate Insurance Company*, 517 U.S. 706 (1996). Further, the rationale, reasoning, and legal analysis set out in *Webb* is consistent with Texas law and cases from the other circuits. For these reasons, Webb's Petition for Writ of Certiorari should be denied.

II. *Webb v. B.C. Rogers* stands for the proposition that *Burford* abstention cannot be used to remand a damages only action.

Jack Webb – Special Deputy Receiver from Employer's National Insurance Company ("ENIC") in receivership – sued B.C. Rogers – an ENIC policyholder – in Texas State Court, seeking to recover $674,335.00 in allegedly unpaid workers' compensation insurance premiums. Webb asserted three claims in this suit: (1) breach of contract, (2) *quantum meruit*, and (3) suit on a sworn account.

B.C. Rogers removed the case to federal court. Webb asked the federal court to remand the case based on the *Burford* abstention doctrine. The district court granted Webb's Motion to Remand, finding that *Burford*'s abstention was appropriate:

> Abstention is appropriate in this case, for if this Court were to exercise federal jurisdiction, it

> could well interfere with the State of Texas' efforts to effect a coherent policy on a matter of public concern, that is, the collection of assets of an insolvent insurer through a state district court receivership proceeding wherein the state district court retains continuing jurisdiction over the liquidation proceedings.

Appendix B to Petition.

B.C. Rogers appealed the district court's Remand Order. The Fifth Circuit Court of Appeals reversed, finding that the *Burford* abstention was not available in a damages only action:

> Because the district court lacked discretion to remand these damages actions, we REVERSE and REMAND for further proceedings consistent with this opinion.

Webb, 174 F.3d at 705. The *Webb* decision is on point with this Court's recent decision in *Quackenbush v. Allstate Insurance Company, supra,* and other post-*Quackenbush* decisions.

III. In *Quackenbush*, this Court held that *Burford* abstention could not be used to remand or dismiss a damages only action.

Webb v. B.C. Rogers is on point factually and legally with this Court's opinion in *Quackenbush v. Allstate Insurance Company*, 517 U.S. 706 (1996). As in *Webb*, *Quackenbush* involved the application of the *Burford* abstention doctrine to the remand of a damages only lawsuit brought by the receiver of an insolvent insurance company. Prior to *Quackenbush*, the Court had never addressed "whether principles underlying our abstention

cases would support the remand or dismissal of a common-law action for damages." *Quackenbush*, 517 U.S. at 719. Against this backdrop, the Court framed the issue in *Quackenbush* as follows:

> In this case, we consider whether . . . the abstention doctrine first recognized in *Burford v. Sun Oil Company*, 319 U.S. 315, 63 S.C. 1098, 87 L. Ed. 1424 (1943), can be applied in a common-law suit for damages.

Id. at 709. This Court resolved that issue by clearly stating that *Burford* abstention is not appropriate in a case for money damages:

> Under our precedents, federal courts have the power to dismiss or remand cases based on abstention principles only where the relief sought is equitable or otherwise discretionary. Because this was a damages action, we conclude that the district court's remand order was an unwarranted application of the *Burford* doctrine.

Id. at 731.

Webb refuses to acknowledge and accept the clear and unequivocal *Quackenbush* holding. Instead, Webb clings to a passage from *Quackenbush* dealing with the roots and purposes of the abstention doctrine in an attempt to argue that abstention is avoidable in this damages only action. Petition at p. 12. Webb used this tact in the court below, and Justice Smith correctly rejected Webb's overly simplistic reading of *Quackenbush*. *Webb*, 174 F.3d at 702-703. Instead, Justice Smith noted correctly that when this Court reached its holding in *Quackenbush*:

> it left no exceptions: abstention is appropriate "*only* where the relief being sought is equitable or otherwise discretionary."

Webb, 174 F.3d at 703, citing *Quackenbush*, 517 U.S. at 731 (emphasis added).

The Fifth Circuit's *Webb* opinion is well researched, reasoned and written. The factual background in question presented is on point with what this Court reviewed in *Quackenbush*. Nothing in the *Webb* opinion merits review by this Court. Additionally, nothing in the *Webb* opinion conflicts with the rulings of the other circuits or any Texas court.

IV. *Webb* is consistent and in line with decisions from other circuits regarding the application of *Burford* abstention after *Quackenbush*.

There is no dispute that prior to *Quackenbush* the Fifth Circuit and other federal courts had consistently used *Burford* abstention to remand actions against involving insurance companies in ongoing state delinquency proceedings. *See, e.g., Barnhardt Marine Ins., Inc. v. New England Int'l Sur. of Am., Inc.*, 961 F.2d 529 (5th Cir. 1992); *Martin Ins. Agency, Inc. v. Prudential Reins. Co.*, 910 F.2d 249 (5th Cir. 1990); *Gonzalez v. Media Elements, Inc.*, 946 F.2d 157 (1st Cir. 1991); *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38 (2d Cir. 1986); *Lac D' Amiante du Quebec, Ltee v. American Home Assurance Co.*, 864 F.2d 1033 (3d Cir. 1988); *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141 (8th Cir. 1995); *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699 (10th Cir. 1988). Further, some of these cases upheld the *Burford* abstention in such actions without regard for the

type of relief sought. *See, e.g., Wolfson*, 51 F.3d at 147; *Lac D' Amiante*, 864 F.2d at 1044.

Quackenbush, however, changed, or at least clarified, the law. In that opinion, this Court cautioned the lower courts against too easily relinquishing congressionally mandated diversity jurisdiction. *Quackenbush*, 517 U.S. at 715 ("federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress"). As noted, *Quackenbush* limited a federal court's ability to invoke an abstention doctrine to those cases where the relief sought relied on a court's discretion. *Id.* at 731. This limit was based on the history of the abstention doctrines and serves as a protector of the congressionally granted federal court jurisdiction.

Since *Quackenbush*, the federal courts have followed this clear mandate and will only abstain where the relief sought relies on the court's discretion. *See, e.g., Munich American Insurance Company v. Crawford*, 141 F.3d 585, 589 (5th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 539 (1999) (acknowledging that a court may abstain "only where the district court has discretion to grant or deny relief"); *Front Royal and Warren County Ind. Park Corp. v. Town of Front Royal, Virginia*, 135 F.3d 275, 282 (4th Cir. 1998) (acknowledging and accepting *Quackenbush's* limitation on abstention and stating that "[i]n damages actions, a federal court cannot dismiss the action but can enter a stay to await the conclusion of the state proceeding."); *DeMauro v. DeMauro*, 115 F.3d 94, 98 (1st Cir. 1997) (finding that a district court may not invoke an abstention to dismiss a damages only action).

Webb cites the First Circuit's opinion in *DeMauro* as a basis upon which this Court should accept jurisdiction. The *DeMauro* court stated in dicta that it read the *Quackenbush* opinion to mean "that abstention, under *Burford* or otherwise may be appropriate in suits for damages." *See DeMauro*, 115 F.3d at 98. According to *Webb*, this conflicts with the Fifth Circuit's opinion in *Webb*.

Webb's analysis is wrong. If Webb had read the next paragraph in the *DeMauro* opinion, he would have seen that the First Circuit acknowledged and embraced the fact that a remand or dismissal under *Burford* is not available in a damages only action:

> [B]ut the court means what it says: *Quackenbush* held that the dismissal of a damages action on *Burford* grounds was reversible error, without deciding "a more limited abstention based stay order would have been warranted on the facts of this case."

DeMauro, 115 F.3d at 98, citing *Quackenbush*, 517 U.S. at 731.

Webb's suggestion that the *Webb* opinion conflicts with the Fifth Circuit's prior decision in *Clark v. Fitzgibbons*, 105 F.3d 1049 (5th Cir. 1997) is legally and logically flawed. Webb advanced this argument in the court below and it was rejected. *Webb*, 174 F.3d at 702. *Clark* involved the Fifth Circuit's review of an abstention-based remand order in a suit brought by an Arizona insurance receiver attempting to recover money for an insolvent insurance company. Among the relief sought by the insurance receiver in *Clark* was an injunction to prohibit the misappropriation of funds. As the plaintiff asked for injunctive relief – a remedy that relies on the court's discretion –

Quackenbush did not apply. Unlike the receiver in *Clark*, the receiver in *Webb* does not seek discretionary relief. Accordingly, the *Clark* opinion and the *Webb* opinion do not conflict. Further, both are consistent with *Quackenbush*.

V. *Quantum meruit* is a claim for money damages and is not a claim that can be remanded based on the *Burford* abstention doctrine.

Webb seeks $674,335.00 in money damages from B.C. Rogers. Webb argues that his claim for *quantum meruit* – a remedy based on an equitable doctrine – means that the district court's remand order fits within the confines of *Quackenbush's* "equitable or otherwise discretionary" exception. The Fifth Circuit addressed this argument in the *Webb* opinion and noted that a claim for *quantum meruit* seeks money damages and that "when a court hears a claim for *quantum meruit*, it neither sits in equity nor possesses discretion." *Webb*, 174 F.3d at 704. Thus, since *quantum meruit* is a claim for money damages only, and is not based on the court's discretion to grant or deny relief, it does not fit within *Quackenbush's* narrow exception. *Id.* at 705.

The Fifth Circuit's conclusions regarding *quantum meruit* are well reasoned and well researched. In his opinion, Justice Smith acknowledged that "courts frequently refer to *quantum meruit* as an equitable doctrine and even as seeking equitable relief." *Webb*, 174 F.3d at 704. He then goes on to cite numerous cases, including cases from Texas, where *quantum meruit* is discussed as being an action based on equitable principles. *See Webb*, 174 F.3d at

704-05, n. 17, 18 and 19. Regardless, as Justice Smith notes, the relief sought is money damages and the claim cannot be remanded on abstention grounds. *Id.* at 705.

Despite Justice Smith's fair treatment of the subject, Webb argues that the Fifth Circuit's opinion conflicts with an opinion from the Second Circuit and two opinions from the Texas Supreme Court. Webb's argument is disingenuous. Webb provides no legal or factual analysis for the opinions he cites. The Second Circuit opinion cited by Webb, *McNamee, Lochner, Titus & Williams, P.C. v. Higher Education Assistance Foundation*, 50 F.3d 120 (2nd Cir. 1994), merely referred to *quantum meruit* as an "equitable remedy". Further, the *McNamee* court made this statement in a footnote and as dicta. *McNamee*, 50 F.2d at 125 n. 1. Regardless, this dicta does not conflict with anything the Fifth Circuit stated in *Webb*. The *Webb* opinion acknowledges that *quantum meruit* is based on an equitable doctrine. The issue, however, is that the relief sought is money damages. In this regard, the *Webb* opinion is completely consistent with the *McNamee* opinion, as money damages were also sought in that case. *See McNamee*, 50 F.3d at 123 (plaintiff seeking to recover money damages for serviced rendered).

Webb's argument that the Fifth Circuit's opinion conflicts with the Texas Supreme Court rulings on *quantum meruit* is also wrong. Again, Webb provides no legal or factual analysis of *Vortt Exploration Co. v. Chevron USA*, 787 S.W.2d 942, 944 (Tex. 1990) or *Truly v. Austin*, 744 S.W.2d 934, 938 (Tex. 1988). In both cases, the Texas Supreme Court discussed the fact that *quantum meruit* is based on an equitable doctrine. *See Vortt*, 787 S.W.2d at 944; *Truly*, 744 S.W.2d at 938. That historical foundation is

of no import. The relief sought in *Vortt* and *Truly* was money damages. *See Vortt*, 787 S.W.2d at 944 (suit for the recovery of money for providing seismic information to oil company); *Truly*, 744 S.W.2d at 936 (suit for the recovery of money based on services performed on behalf of a joint venture). As such, the Fifth Circuit's opinion in *Webb* and the Texas Supreme Court's opinions in *Vortt* and *Truly* are consistent. All three opinions acknowledged the equitable foundations of *quantum meruit*, but all three are money damages cases.

VI. *Quantum meruit* is a claim for legal relief and cannot be remanded based on the *Burford* abstention doctrine.

In *Quackenbush*, this court clearly dictated that abstention-based remand was not available in a damages only action. Only where the relief sought is discretionary, may a court invoke an abstention doctrine to remand or dismiss a cause of action. Based on this clear mandate, it is equally clear that Webb's claim for money damage based on *quantum meruit* is not subject to remand on abstention grounds.

It is not disputed that Webb's claim for *quantum meruit* seeks only money damages. The fact that court's have stated that *quantum meruit* has some relationship to claims sounding in equity does not render the nature of relief sought "equitable" for purposes of this analysis. The beginning and end of the inquiry is whether the *relief* sought is legal – money damages – or equitable – dependent on the court's discretion.

This Court and other federal courts often deal with the issue of characterizing a claim as legal or equitable when deciding whether a litigant is entitled to a jury trial on a certain claim. The Seventh Amendment provides:

> In suits of common law, where the value in controversy shall exceed $20.00 the right of trial by jury shall be preserved . . .

U.S. Const. amend. VII. This court has long held that actions for damages are actions at law triable to a jury. *See Whitehead v. Shattec*, 138 U.S. 146, 151 (1891); *Pernell v. South Hall Realty*, 416 U.S. 363, 370 (1974). In *Whitehead*, this court recognized that:

> [I]t would be difficult, and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law . . . ; but this may be said, that where an action is simply for the recovery . . . of a money judgment, the action is one at law.

Whitehead, 138 U.S. at 151. *Quantum meruit* is simply a claim for the recovery of a money judgment. It is an action at law and not a suit in equity. Accordingly, Webb's claim for *quantum meruit* falls squarely within the broad net cast by *Quackenbush* and supports the Fifth Circuit's finding in *Webb* that the *quantum meruit* claim was not subject to remand on abstention grounds.

VII. Historically, *quantum meruit* is a claim that evolved in the common law courts.

Even though modern day courts sometimes state that *quantum meruit* is based on an equitable doctrine, the

claim has its origins in the common law courts. *Quantum meruit* was an action at common law which derived from the claim of assumpsit. RESTATEMENT, RESTITUTION, Part I, Introductory Note pp. 5-8 (discussing the development of *quantum meruit* in the common law courts based on suits in assumpsit); Dictionary of Modern Legal Usage 457 (1987) ("*Quantum meruit* [was] used at common law by pleaders in suits in assumpsit, and [is] still used today."); Black's Law Dictionary 112 (5th ed. 1979) (Assumpsit is "a common law form of action . . . [which] may be maintained whenever anything is received or done from the circumstances of which the law implies a promise of compensation."); Benjamin J. Shipman, Handbook of Common-Law Pleading 167 (3d ed. 1923) (categorizing *quantum meruit* as a form of general assumpsit brought to recover compensation for work done or services rendered); J.B. Ames, The History of Assumpsit: Implied Assumpsit, 2 Harv. L. Rev. 53, 58, 59-60 (1888) (noting that *quantum meruit* recovery in assumpsit first appeared in 1609 and attributing this "late" development to the existence of alternative remedies in equity); *see also Henderson Bridge Co. v. McGrath*, 134 U.S. 260, 275-76, (1890) (affirming jury verdict and instructions given for *quantum meruit* action brought at law). Thus, based on the true historical background of *quantum meruit*, it is undeniable that a claim for *quantum meruit* could not be remanded on abstention grounds. Only when the court "is asked to employ its historic powers as a court of equity" can it invoke an abstention doctrine. *Quackenbush*, 517 U.S. at 717 (citations omitted). *Quantum meruit* was not a creature of the equity courts.

VIII. *Webb* presents no significant issues for this Court's review.

Webb claims that the McCarran-Ferguson Act is somehow offended by the *Webb* opinion. This argument is wrong. "The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, did not remove federal diversity jurisdiction from the federal courts in insurance matters." *Martin Ins. Agency, Inc. v. Prudential Reins. Ins. Co.*, 910 F.2d 249, 254 (5th Cir. 1990). Thus, what Congress granted the federal courts in diversity jurisdiction, it did not take away in the McCarran-Ferguson Act. Nothing in the McCarran-Ferguson Act precludes a federal court from hearing a simple damages action. Webb's McCarran-Ferguson Act argument is irrelevant.

Webb also makes the "sky is falling" argument that allowing a federal court to try a simple damages action brought by a state appointed receiver will disrupt the entire insurance insolvency scheme set up by the State of Texas. This argument is nothing more than a rote recitation of the *Burford* doctrine without any analysis. Regardless, this court in *Quackenbush* addressed the situation of a federal court case that might disrupt the state's ongoing proceeding; under those circumstances, the federal court may stay the proceedings, but not remand or dismiss. *Quackenbush*, 517 U.S. at 731. Under any circumstances, the district court in this case abused its discretion by remanding this damages only action. The Fifth Circuit correctly decided *Webb*.

IX. Conclusion

On all grounds, *Webb* fails to present a case worthy of Supreme Court review. The Fifth Circuit's opinion in *Webb v. B.C. Rogers* is completely consistent with this Court's opinion in *Quackenbush v. Allstate Insurance Company*. Simply stated, *Webb* echoes the *Quackenbush* holding that abstention based remand is not available in a damages only action. Further, the Fifth Circuit's *Webb* opinion is completely consistent with the rulings of the Texas Supreme Court and those to the other circuits.

For these reasons, Webb's Petition for Writ of Certiorari should be DENIED.

Respectfully submitted,

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